Supreme Court, U.S.
FILED

No. _____ 10-996 FEB 1 - 2011

OFFICE OF THE CLERK

In The

Supreme Court of the United States

NOEL PROCTOR,

Petitioner,

vs.

ROBERT "FORD" HUNTINGTON and CHRISTINA HUNTINGTON, husband and wife and the marital community therein,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Washington

PETITION FOR WRIT OF CERTIORARI

BRETT A. PURTZER
Counsel of Record

HESTER LAW GROUP, INC., P.S.
Attorneys for Petitioner
1008 South Yakima Avenue
Suite 302
Tacoma, Washington 98405
(253) 272-2157
Brett@hesterlawgroup.com

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED FOR REVIEW

Whether an equitable remedy that forces the transfer of private real property from one private party to another violates the Fourteenth Amendment to the United States Constitution?

LIST OF PARTIES

Petitioner: Noel Proctor

Respondents: Robert "Ford" Huntington
Christina Huntington

TABLE OF CONTENTS

		Page
I.	OPINIONS BELOW	1
II.	JURISDICTION	1
III.	CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
IV.	STATEMENT OF THE CASE	3
	A. Procedural History	3
	B. Statement of Facts	5
V.	REASONS FOR GRANTING PETITION	7
	A. Argument	8
	1. EVOLUTION OF ENCROACHMENT ON WASHINGTON PRIVATE PROPERTY RIGHTS	8
	2. PRIVATE PROPERTY RIGHTS AND THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION	16
VI.	CONCLUSION	20

APPENDIX

Opinion of Washington State Supreme Court dated August 19, 2010, *Proctor v. Huntington*, 169 Wn.2d 491, 238 P.3d 1117 (2010).....App. 1

Opinion of Washington State Court of Appeals, Division II, dated September 23, 2008, *Proctor v. Huntington*, 146 Wn.App. 836, 192 P.3d 958 (2008).....App. 35

TABLE OF CONTENTS – Continued

Page

Final Order and Judgment in the Superior Court of the State of Washington for Skamania County dated March 1, 2007 ..... App. 57

Findings of Fact and Conclusions of Law in the Superior Court of the State of Washington for Skamania County dated March 1, 2007..... App. 61

Order Denying Motion for Reconsideration in the Washington State Supreme Court dated November 4, 2010 ..... App. 72

Memorandum of Amicus Curiae Citizens' Alliance for Property Rights in the Washington State Supreme Court dated September 13, 2010 ..... App. 73

TABLE OF AUTHORITIES

Page

FEDERAL CASES:

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982) 9

Missouri Pacific Railway Company v. Nebraska, 164 U.S. 403, 17 S. Ct. 130, 41 L. Ed. 489 (1896) 8

Phillips v. Washington Legal Foundation, 524 U.S. 156, 118 S. Ct. 1925, 141 L. Ed. 2d 174 (1998) 9

Ruddock v. Bloedel Donovan Lumber Mills, 28 F.2d 684 (9th Cir. 1928) 16, 17, 19, 20

Wilkinson v. Leland, 27 U.S. 627, 2 Peters 627, 7 L. Ed. 542 (1829) 9

STATE CASES:

Arnold v. Melani, 75 Wn.2d 143, 437 P.2d 908 (1968) 11, 15

Proctor v. Huntington, 169 Wn.2d 491, 238 P.3d 1117 (2010) 1, 5, 15, 20

Tyree v. Gosa, 11 Wn.2d 572, 119 P.2d 926 (1941) 10, 11

CONSTITUTIONAL PROVISIONS:

U.S. Const., amend. XIV, § 1 ..... *passim*

Washington Const., art. I, § 16 ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES:

7 Stuart M. Speiser, Charles F. Krause, Alfred W. Gans, *The American Law of Torts,* §§ 23:9, :12, at 641, 646-47 (1990).....9

Black's Law Dictionary, 607 (9th ed. 2009).....9

I. OPINIONS BELOW

After a three day bench trial beginning September 12, 2006, the trial court ordered petitioner, Noel Proctor, to convey one acre of his land, which was to include the Huntingtons' house, garage, yard, and well, to the respondents in exchange for $25,000. A final order and judgment and findings of fact and conclusions of law consistent with that order were entered on March 1, 2007. App. 57 and 61.

Mr. Proctor appealed that order to the Washington State Court of Appeals which affirmed the trial court's decision. *See Proctor v. Huntington*, 146 Wn.App. 836, 192 P.3d 958 (2008). App. 35.

Mr. Proctor filed a petition for review with the Washington State Supreme Court which was granted. The Washington State Supreme Court affirmed the Court of Appeals' decision. *See Proctor v. Huntington*, 169 Wn.2d 491, 238 P.3d 1117 (2010). App. 1. Petitioner filed a motion for reconsideration on September 8, 2010, which the Washington State Supreme Court denied on November 4, 2010. App. 72.

Petitioner now petitions for a writ of certiorari to the United States Supreme Court.

II. JURISDICTION

By Order dated November 4, 2010, the Washington State Supreme Court denied petitioner's motion for reconsideration. App. 72. The Supreme Court has

jurisdiction to hear this case pursuant to 28 U.S.C. § 1257.

III. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

A. U.S. Const., amend. XIV, § 1, which provides:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

B. Washington Const., art. I, § 16, which provides:

> Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches on or across the lands of others for agricultural, domestic, or sanitary purposes. No private property shall be taken or damaged for public or private use without just compensation having been first made, or paid into court for the owner, and no right-of-way shall be appropriated to the use of any corporation other than municipal until full compensation therefor be first made in money, or

> ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in courts of record, in the manner prescribed by law. Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such, without regard to any legislative assertion that the use is public: Provided, That the taking of private property by the state for land reclamation and settlement purposes is hereby declared to be for public use.

IV. STATEMENT OF THE CASE

The Washington State Supreme Court upheld a judicial taking forcing the transfer of private property from one private party to another in violation of the Fourteenth Amendment to the United States Constitution.

A. Procedural History

On February 16, 2005, petitioner Noel Proctor brought an action to eject respondents, Robert "Ford" Huntington and Christina Huntington from and to quiet title to the disputed parcel and to remove their encroachments. CP 1-4.[1] The Huntingtons answered

[1] CP refers to the Clerk's Papers (selected trial court documents) in the state appellate courts.

and counter-claimed to quiet title in themselves to approximately 6.17 acres of Proctor's property through adverse possession or by estoppel in pais. CP 7-12.

At the close of the Huntingtons' case, Proctor moved the court for an order granting his request for a mandatory injunction, which the trial court denied. RP 906.[2] The trial court dismissed the Huntingtons' adverse possession counterclaim. CP 239; RP 914-15.

At the conclusion of the case, the trial court concluded the parties were under a mutual mistake of fact concerning the property's true boundary line. CP 243. During its oral ruling, the court stated the Huntingtons were negligent in not fully ascertaining where their boundaries were located. RP 927. The court denied Proctor's request for a mandatory injunction ejecting the Huntingtons from his land and instead ordered the boundary line adjusted. CP 244; RP 928. To accomplish the boundary line adjustment, the court ordered Proctor to convey to the Huntingtons one acre of his land, which was to include the Huntingtons' house, garage, yard, and well, in exchange for $25,000. CP 244.

On March 1, 2007, Proctor appealed to the Washington State Court of Appeals, Division II, and the Huntingtons cross-appealed. CP 232, 398.

On September 23, 2008, the Court of Appeals entered a published opinion affirming the trial court. App. 35. A petition for review to the Washington State

---

[2] RP refers to Report of Proceedings (trial transcript) in the state appellate courts

Supreme Court was filed on September 23, 2008 and granted on April 1, 2009. The Washington State Supreme Court, in a published opinion, affirmed the Court of Appeals' decision and the judgment in a five-four decision on August 19, 2010. App. 1.

In the dissenting opinion by Justice Sanders he raised the issue that the Court's decision authorized a judicial taking of private property from the lawful landowner for the benefit of the encroacher. *Proctor*, 169 Wn.2d at 515. App. 17.

Petitioner filed a motion to reconsider on September 8, 2010. On behalf of petitioner, an Amicus Curiae Memorandum of Citizens' Alliance for Property Rights was filed on September 13, 2010. The Amicus Curiae brief raised the issue of the federal constitutional claim. App. 81. The Washington State Supreme Court denied the motion to reconsider without comment on November 4, 2010. App. 72. This petition for writ of certiorari follows.

B. Statement of Facts

Noel Proctor has been a pilot with United Airlines for over thirty years. CP 105-06. In 1994, he was living in Colorado but was based in New York. RP 601. Given his family roots, he began looking to purchase real property in the Northwest. *Id.* He was particularly interested in property with acreage and a quiet, out-of-the-way setting where he could escape from his busy schedule. RP 602. Sometime during the winter of 1994-95, he flew to Portland, Oregon, rented a car, and drove to White Salmon, Washington to view

properties recommended by his realtor. *Id.* One of the properties he visited was the 30-acre parcel he eventually purchased (Proctor property).[3] RP 607.

Proctor completed the purchase of his property in February 1995. RP 607. He did not have the property surveyed to verify the property lines prior to closing because it had already been surveyed. CP 116-17.

Proctor began constructing his home in the spring of 1995. RP 609. At the time, he was based in New York, was living in London, England, and had his residence in Colorado. RP 609-10. In addition to working as a pilot, he worked as a Senior Check Airman with the Department of Transportation Federal Aviation Administration and oversaw flight instructors training air crews to fly through the Middle East and Asia. RP 610-11. Because of Proctor's flight schedule, he returned to his property only occasionally until approximately 2000 or 2001. RP 613, 615.

Ford and Christine Huntington[4] purchased their property which adjoined Proctor's parcel. CP 282, RP 867. They began building their home in 1996 and

---

[3] Proctor's property was one of several parcels created after developer Dusty Moss (Moss) and his partner Carl Stewart (Stewart) subdivided a larger parcel of property sometime before 1993 CP 240 A pipeline runs parallel to the northern boundary of the Proctor and Huntington properties CP 112, 208; RP 639. Proctor's property is identified as parcel 201 on the map at CP 208

[4] The Huntingtons will be referred to by their first names when necessary for clarity and ease of reading; no disrespect is intended

received a certificate of occupancy in 1997. CP 27, 25. They did not survey their property before locating and building their home. RP 264. Their home and all of their improvements are located on Proctor's property. RP 627-28.

Richard Bell (Bell), a licensed land surveyor, was hired by Proctor in May 2004 to survey Proctor's boundaries because Proctor was concerned about a possible encroachment along the southwestern edge of his property and wanted his entire property surveyed. RP 621, 623, 648, 657, 924-25.

On June 1, 2004, Bell began his survey of Proctor's property. RP 623-24. Bell determined that all of the Huntingtons' improvements were on Proctor's property. RP 627-28.

After the encroachment was discovered, Proctor and the Huntingtons attempted to resolve the boundary dispute through on-going negotiations, but were unsuccessful. CP 50; RP 790; Exs. 94, 96, 98. The legal suit followed.

V. REASONS FOR GRANTING PETITION

The Washington State Supreme Court decided a property rights case that violates the Fourteenth Amendment of the United States Constitution which this Court holds protects the forced transfer of property from one private party to another.

A. Argument.

1. EVOLUTION OF ENCROACHMENT ON WASHINGTON PRIVATE PROPERTY RIGHTS.

This Court holds that "the taking by a State of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is a violation of the Fourteenth Amendment of the Constitution of the United States." *Missouri Pacific Railway Company v. Nebraska*, 164 U.S. 403, 17 S. Ct. 130, 41 L. Ed. 489 (1896).

This Court has also commented on the traditional view of a "taking" and its impact on the property owner:

> The historical rule that a permanent physical occupation of another's property is a taking has more than tradition to commend it. Such an appropriation is perhaps the most serious form of invasion of an owner's property interests. . . .
>
> Moreover, an owner suffers a *special kind of injury* when a *stranger* directly invades and occupies the owner's property. . . . [P]roperty law has long protected an owner's expectation that he will be relatively undisturbed at least in the possession of his property. To require, as well, that the owner permit another

> to exercise complete dominion literally adds insult to injury. (Emphasis added)

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435-36, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982).

"Generally speaking, state law defines property interests." *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 164, 118 S. Ct. 1925, 141 L. Ed. 2d 174 (1998). Encroachment, a form of trespass, occurs when one builds a structure on another's land. *Black's Law Dictionary*, 607 (9th ed. 2009). Historically, property owners enjoyed an absolute right to eject trespassers and to remove encroaching structures even if the trespassers believed in good faith the property was theirs. *See* 7 Stuart M. Speiser, Charles F. Krause, Alfred W. Gans, *The American Law of Torts*, §§ 23:9, :12, at 641, 646-47 (1990). Further, this Court has recognized "[t]he fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred." *Wilkinson v. Leland*, 27 U.S. 627, 2 Peters 627, 657, 7 L. Ed. 542 (1829).

Importantly, Article 1, Section 16 of the Washington State Constitution states, in pertinent part, as follows:

> Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches on or

> across the lands of others for agricultural, domestic, or sanitary purposes. . . .

Wash. Const., art. I, § 16. This state constitution provision has been adhered to by the Washington State Supreme Court in various cases. In *Tyree v. Gosa*, 11 Wn.2d 572, 119 P.2d 926 (1941), an encroachment case, the State Supreme Court reviewed the lower court's decree requiring the plaintiff landowner to sell and surrender his property to defendant landowners at a value fixed by the lower court. In reversing the decree, the Supreme Court held as follows:

> It is very difficult to see how one can get an equity in the land of another merely building upon it, however innocently. It is clear, however, – and this is all that is necessary to now decide – that the doctrine invoked cannot be applied in the instant case; for, manifestly, the effect of the court's decision is to condemn the appellant's strip of the land for the private use of Pope & Talbot, Inc., contrary to the provisions of our state constitution relating to condemnation. Article 1, § 16, as amended by amendment IX, provides, in part, as follows:
>
> "Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches on or across the lands of others for agricultural, domestic, or sanitary purposes. . . ."
>
> By the decree ordering Tyree to deed the strip of land to Pope & Talbot, Inc., his land

> is taken for the private use of Pope & Talbot, Inc., and that private use is not within the exception clause. Hence, that portion of the decree is invalid. No court has the power to compel the appellant to convey and surrender his property for any other person's private use (except for ways of necessity, etc.) in exchange for two hundred and fifty dollars, or any other sum, no matter how great.

Tyree, *supra*, at 580-81.

Until the late 1960's, *Tyree* was the law in Washington State regarding the taking of property from one private party and transferring it to another. Such "taking" was not allowed. Subsequently, however, upon reviewing another encroachment case similar to that decided in *Tyree*, the Washington Supreme Court, reached a markedly different conclusion and distanced itself from *Tyree* by holding that "the language contained in *Tyree v. Gosa*, *supra*, regarding Const. art. I, § 16 (amendment 9) was not required for the opinion." *See Arnold v. Melani*, 75 Wn.2d 143, 151-52, 437 P.2d 908 (1968). In support of its opinion, the Washington Supreme Court stated as follows:

> *Tyree v. Gosa*, 11 Wn.2d 572, 119 P.2d 926 (1941), involved a situation in which the encroacher, after correcting his own survey by 20 feet, and after being warned of a dispute as to a property line, took a chance by constructing two houses on the questioned area. The trial court, in protecting the encroacher, was clearly in error because of the absence of "entire good faith" as required in *Peoples*

Sav. Bank v. Bufford, *supra*. *See* Annot. 28 A.L.R.2d *supra*, at 679. Although it was unnecessary for the decision, we stated that Const. art. 1, § 16 (amendment 9) was determinative. This section provides: "Eminent Domain. Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches. . . ." In *Tyree*, *supra*, at 581, we concluded that upon the basis of this provision "[n]o court has the power to compel the appellant to convey and surrender his property for any other person's private use. . . ."

The rights of landowners existed and were held sacred as against other individuals long before the enactment of this constitutional provision. It is elementary that "[t]he fundamental maxims of a free government seem to require, that the rights of personal liberty and *private property* should be held sacred." (Italics ours.) *Wilkinson v. Leland*, 27 U.S. (2 Peters) 627, 657, 7 L. Ed. 542 (1829). Eminent domain, the subject matter of Const. art. 1, § 16 (amendment 9), is an inherent power of the sovereign, *State ex rel. Mountain Timber Co. v. Superior Court*, 77 Wash. 585, 137 Pac. 994 (1914), which in no way depends upon the state constitution for its existence. Indeed, a state constitution is a limitation of the power of the governing. The sole purpose of this constitutional provision is to define the limitations placed upon the inherent power of a governing body in dealing with the governed in this regard. *State ex rel. Troy v. Yelle*, 27 Wn.2d 99, 176 P.2d 459,

170 A.L.R. 1425 (1947); *State ex rel. Mountain Timber Co. v. Superior Court*, *supra*, at 586. There is no reason or purpose in limiting an individual's right of eminent domain in that without delegation from the governing body no such right is inherent or existent in an individual. The foregoing becomes even more evident upon consideration that Const. art. 1, § 16 (amendment 9) is simply recognition of amendment 14 to the United States Constitution (due process) together with its judicial interpretation as stated in *Missouri Pac. Ry. v. Nebraska*, 164 U.S. 403, 417, 41 L. Ed. 489, 17 Sup. Ct. 130 (1896):

> The taking *by a State* of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is a violation of the Fourteenth Article of Amendment of the Constitution of the United States. (Italics ours.)

To suggest that property rights of an individual (other than protection against the sovereign in regard to eminent domain) are created and protected by Const. art. 1, § 16 (amendment 9) misconstrues its sole purpose. To suggest that such a provision somehow divests a court of equity of the power to refuse a mandatory injunction would necessarily by logical extension likewise prohibit the legislative body from establishing rules of limitation (adverse possession) and further, would bar the passing of title by other equitable doctrines based upon negative

conduct, such as estoppel, waiver, or laches. We hold that the language contained in *Tyree v. Gosa*, *supra*, regarding Const. art. 1, § 16 (amendment 9) was not required for the opinion.

As thus construed, *Hart v. Seattle*, *supra*, *Peoples Sav. Bank v. Bufford*, *supra*, and *Tyree v. Gosa*, *supra*, support the premise that a mandatory injunction can be withheld as oppressive when, as here, it appears (and we particularly stress), that: (1) The encroacher did not simply take a calculated risk, act in bad faith, or negligently, willfully or indifferently locate the encroaching structure; (2) the damage to the landowner was slight and the benefit of removal equally small; (3) there was ample remaining room for a structure suitable for the area and no real limitation on the property's future use; (4) it is impractical to move the structure as built; and (5) there is an enormous disparity in resulting hardships.

Ordinarily, even though it is extraordinary relief, a mandatory injunction will issue to compel the removal of an encroaching structure. However, it is not to be issued as a matter of course. We do not deny that a "sacred" right exists in a free society as to the protection of the concept of private property; we simply hold that when an equitable power of the court is invoked, to enforce a right, the court must grant equity in a meaningful manner, not blindly. "There is no question but that equity has a right to step in and

> prevent the enforcement of a legal right whenever such an enforcement would be inequitable." *Thisius v. Sealander*, 26 Wn.2d 810, 818, 175 P.2d 619 (1946). If this is so, then equity has the right to deny the extraordinary remedy of mandatory injunction. However, in that the relief granted by the denial of the injunction affects a landowner's possessory rights, as do laches and estoppel, and is exceptional relief for the exceptional case, we further require (as was present in this case) that the evidence of the elements listed above be clearly and convincingly proven by the encroacher.

Arnold, *supra*, at 150-52.

Although *Arnold* started eroding citizens' property rights in the State of Washington, the Supreme Court's decision in *Proctor v. Huntington*, 169 Wn.2d 491, 238 P.3d 1117 (2010) caused them to slide away. The *Proctor* court re-wrote *Arnold* by modifying its five part test into a balancing of equities by "[reasoning] through the *Arnold* factors in light of *all* the facts as part of the equitable consideration of whether an injunction is appropriate." *Proctor*, 169 Wn.2d at 500-03. In such holding, the *Proctor* court concluded that nothing within its holding "undermines fundamental property rights . . . " *Proctor*, 169 Wn.2d at 504.

Respectfully, *Proctor*, indeed, undermines Washington States' citizens' property rights as *Proctor* violates both art. I, § 16 of the Washington Constitution and,

more importantly, the Fourteenth Amendment to the United States Constitution.

2. PRIVATE PROPERTY RIGHTS AND THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

In *Ruddock v. Bloedel Donovan Lumber Mills*, 28 F.2d 684 (9th Cir. 1928), the Ninth Circuit Court of Appeals reviewed a Washington State statute that authorized the taking of private property for private use. The appellants urged that such statute violated the Fourteenth Amendment of the United States Constitution. The Ninth Circuit, in delivering its opinion, stated as follows:

> The appellants earnestly insist that the Washington statute authorizes the taking of private property for a private use, and violates the Fourteenth Amendment to the Constitution of the United States. The validity of the statute has been upheld by the Supreme Court of the state in *State ex rel. Mountain Timber Co. v. Superior Ct.*, 77 Wash. 585, 137 P. 994; *State ex rel. Grays Harbor Logging Co. v. Superior Ct.*, 82 Wash. 503, 144 P. 722; *State ex rel. Eastern Ry. & Lumber Co. v. Superior Ct.*, 127 Wash. 30, 219 P. 857; *State ex rel. White Pine Sash Co. v. Superior Ct.*, 143 Wash. 687, 255 P. 1025; *State ex rel. Woodruff v. Superior Ct.*, 145 Wash. 129, 259 P. 379; and it is perhaps needless to say that the construction thus placed on the Constitution

> and laws of the state by the highest court of the state is controlling on this court. *Bucher v. Cheshire R. Co.*, 125 U.S. 555, 8 S. Ct. 974, 31 L. Ed. 795. Not so, however, as to the federal question involved. Thus, in *Grays Harbor Logging Co. v. Coats-Fordney Logging Co.*, 243 U.S. 251, 37 S. Ct. 295, 61 L. Ed. 702, a writ of error was sued before final judgment to review the judgment in *State ex rel. Grays Harbor Logging Co. v. Superior Ct., supra*, and in dismissing the writ for that reason, the court said:
>
> "When the litigation in the state courts is brought to a conclusion, the case may be brought here upon the federal questions already raised as well as any that may be raised hereafter; for although the state courts, in the proceedings still to be taken, presumably will feel themselves bound by the decision heretofore made by the Supreme Court ([*State ex rel. Grays Harbor Logging Co. v. Superior Ct.*] 82 Wash. 503 [144 P. 722]) as laying down the law of the case, this court will not be thus bound."

Ruddock, supra, at 685-86.

The Ninth Circuit was mindful that although State court decisions are entitled to deference, the time may come when a taking of property is forbidden by the Fourteenth Amendment to the United States Constitution.

> But when we come to inquire what are public uses for which the right of compulsory taking

may be employed, and what are private uses for which the right is forbidden we find no agreement, either in reasoning or conclusion. The one and only principle in which all courts seem to agree is that the nature of the uses, whether public or private, is ultimately a judicial question. The determination of this question by the courts has been influenced in the different states by considerations touching the resources, the capacity of the soil, the relative importance of industries to the general public welfare, and the long-established methods and habits of the people. In all these respects conditions vary so much in the states and territories of the Union that different results might well be expected. The propriety of keeping in view by this court, while enforcing the Fourteenth Amendment, the diversity of local conditions and of regarding with great respect the judgments of the state courts upon what should be deemed public uses in that state, is expressed, justified, and acted upon in *Fallbrook Irrigation District v. Bradley ubi supra* [164 U.S. 112, 17 S. Ct. 56, 41 L. Ed. 369], *Clark v. Wells ubi supra* [*Nash*, 198 U.S. 361, 25 S. Ct. 676, 49 L. Ed. 1085, 4 Ann. Cas. 1171] and *Strickley v. Highland Boy Mining Co., ubi supra*. What was said in these cases need not be repeated here. No case is recalled where this court has condemned as a violation of the Fourteenth Amendment a taking upheld by the state court as a taking for public uses in conformity with its laws. In *Missouri Pacific Railway v. Nebraska, ubi supra*, it was

> pointed out (page 416 [of 164 U.S. (17 S. Ct. 130, 41 L. Ed. 489)]) that the taking in that case was not held by the state court to be for public uses. We must not be understood as saying that cases may not arise where this court would decline to follow the state courts in their determination of the uses for which land could be taken by the right of eminent domain. The cases cited, however, show how greatly we have deferred to the opinions of the state courts on this subject, which so closely concerns the welfare of their people. We have found nothing in the Federal Constitution which prevents the condemnation by one person for his individual use of a right of way over the land of another for the construction of an irrigation ditch; of a right of way over the land of another for an aerial bucket line; or of the right to flow the land of another by the erection of a dam. It remains for the future to disclose what cases, if any, of taking for uses which the state Constitution, law, and court approve will be held to be forbidden by the Fourteenth Amendment to the Constitution of the United States.

Ruddock, *supra*, at 686-87.

The common thread in the cases referenced by the Ninth Circuit all dealt with the taking of private property for a necessity, whether for a right of way, an irrigation ditch, or an aerial bucket line. Such takings for a necessity are also recognized by the Washington State Constitution, art. I, § 16.

Proctor, *supra*, however, doesn't follow this recognized theme and renders almost a century of court decisions meaningless. The encroachment upheld in *Proctor* was not for a necessity, it was for a mistake and convenience, and it denied petitioner his private property without due process. This is the case that the *Ruddock* court contemplated, and this is the case this Honorable Court should decide.

VI. CONCLUSION

Respectfully, the taking of petitioner's property, and the constitutional issue it raises, should be addressed by this Honorable Court as Mr. Proctor's property was taken without due process of law as guaranteed to him by the Fourteenth Amendment of the United States Constitution.

Based on the arguments, records and files contained herein, petitioner urges this Court to grant this petition for writ of certiorari, and to set this matter for further briefing and argument as this Court deems necessary.

RESPECTFULLY SUBMITTED this 1st day of February, 2011.

HESTER LAW GROUP, INC., P.S.
Attorneys for Petitioner

BRETT A. PURTZER
WSB #17283

NOEL PROCTOR, *Petitioner*, v. ROBERT "FORD" HUNTINGTON ET AL., *Respondents*.

No. 82326-0

SUPREME COURT OF WASHINGTON

169 Wn.2d 491; 238 P.3d 1117; 2010 Wash. LEXIS 707

January 12, 2010, Argued
August 19, 2010, Filed

COUNSEL: Emmelyn Hart-Biberfeld and Philip A. Talmadge (of *Talmadge/Fitzpatrick*), and Katharine W. Mathews, for petitioner.

Bradley W. Andersen and Philip J. Haberthur (of *Schwabe Williamson & Wyatt*), for respondents.

JUDGES: AUTHOR: Justice Debra L. Stephens. WE CONCUR: Justice Charles W. Johnson, Justice Tom Chambers, Justice Susan Owens, Justice Mary E. Fairhurst. AUTHOR: Justice Richard B. Sanders. WE CONCUR: Chief Justice Barbara A. Madsen, Justice Gerry L. Alexander, Justice James M. Johnson.

OPINION BY: Debra L. Stephens

OPINION

EN BANC

STEPHENS, J. – Robert and Christina Huntington unwittingly built their house, well, and garage entirely on a portion of land owned by their neighbor, Noel Proctor. Proctor did not realize that the Huntingtons were encroaching at the time, but,

when he learned of the true boundary line between the properties, he sued to eject them. The trial court refused to issue an injunction forcing the Huntingtons to remove their home, instead requiring Proctor to deed them the acre underlying it and accept payment for the value of the land. Proctor asserts that this equitable remedy was impermissible under the circumstances of this case. We disagree, and we affirm the court below.

FACTS AND PROCEDURAL HISTORY

Dusty Moss subdivided his property in Skamania County into a 30-acre parcel, which Noel Proctor later purchased, and a 27-acre parcel, which the Huntingtons later purchased. Moss showed each of the purchasers the general property lines of the two parcels. In the summer of 1994, the Huntingtons camped in an area that they believed was their property, but in reality was on Proctor's parcel (the Disputed Area). They returned to camp there the next spring, at which time Proctor, who had acquired his land in the intervening year, came to the Huntingtons' campsite to introduce himself. Proctor did not object to the location of the campsite and did not realize it was on his property.

The boundary confusion arose because Moss had a surveyor, Dennis Peoples, set a pin along the northern border of Proctor's property (the 16th pin). The 16th pin was set to regulate logging activities north of the parties' parcels and was not intended to

mark the northwest corner of the Huntingtons' parcel. The actual boundary lay 400 feet east of the pin. When clearing their home site, however, the Huntingtons asked Peoples to confirm the northwest corner of their property. Peoples mistakenly referred to the 16th pin as the boundary marker, suggesting that the Huntingtons' parcel extended farther than it did.[1]

The Huntingtons relied on this representation, meeting with Proctor at the 16th pin in the summer of 1995. Ford Huntington told Proctor that Peoples had identified the pin as the northwest corner of the Huntington parcel. Proctor did not object to or question the accuracy of this information. Over that summer and the next, the Huntingtons built their house, garage, and well in the Disputed Area. Proctor also built his own house. The Huntingtons have resided full time in their house since its completion in 1996.

In 2004, Proctor hired a surveyor to locate the corners of his property because he was concerned that another neighbor (not the Huntingtons) was encroaching. The surveyor discovered that the Huntingtons' house, well, garage, and yard were located entirely on Proctor's property. Upon this surprising discovery, the parties tried to work out "some kind of trade, a swap, [or] boundary line

---

[1] Peoples denied having done this, but the trial court, as the finder of fact, believed the Huntingtons' account

adjustment," but negotiations failed. Report of Proceedings (RP) at 773; Clerk's Papers (CP) at 404. In February 2005, Proctor sued to quiet title and eject the Huntingtons from his land. The Huntingtons counterclaimed to quiet title in themselves, asserting adverse possession and estoppel in pais.

The trial court concluded that both parties reasonably, though mistakenly, believed the 16th pin marked the northwest boundary of the Huntingtons' property. It denied the Huntingtons' adverse possession and estoppel claim[2] but refused to issue a mandatory injunction ejecting them. It found that the acre of land on which the Huntingtons' home was built had a fair market value of $ 25,000, and moving the house elsewhere would cause considerable emotional hardship and cost at least $ 300,000. Citing *Arnold v. Melani,* 75 Wn.2d 143, 437 P.2d 908, 449 P.2d 800, 450 P.2d 815 (1968-69), the trial court concluded that the Huntingtons had acted in good faith and that requiring them to move their home and other improvements "would be oppressive . . . and inequitable." CP

---

[2] The trial court determined that Proctor's parcel is designated as forest land, which delayed the running of the adverse possession statute of limitations until the Huntingtons completed their improvements to the land RP at 914-15 (citing RCW 7 28.085). Proctor sued before 10 years had elapsed since the house's construction. *Id.* The Huntingtons did not carry their burden on the estoppel claim because they proved it by a preponderance, but not by clear and convincing evidence. CP at 405-06. The adverse possession and estoppel claims are not before us on review

at 406. Instead, the trial court ordered Proctor to sell the Huntingtons the acre of his property on which they built their home, in exchange for which they would pay $ 25,000. Neither side, the court noted, was the prevailing party under this resolution.

Both parties appealed. One of the areas of contention was whether the trial court had the authority to deny Proctor an injunction under *Arnold*.[3] *See* Br. of Appellant at 30-36. Proctor argued that *Arnold* did not apply because the Huntingtons' encroachment onto his property was not "slight." *Proctor v. Huntington,* 146 Wn. App. 836, 848, 192 P.3d 958 (2008). The Court of Appeals agreed that the encroachment was not slight but nevertheless affirmed the trial court's chosen remedy, concluding it was authorized by an older case. *See id.* at 849-50, 854 (discussing *Peoples Sav. Bank v. Bufford,* 90 Wash. 204, 155 P. 1068 (1916)). We granted review at 165 Wn.2d 1041 (2009).

ANALYSIS

Encroachment occurs when one builds a structure on another's land; it is a form of trespass. BLACK'S LAW DICTIONARY 607 (9th ed. 2009).

---

[3] Another issue was whether the Huntingtons could establish a disparity of hardships if they failed to counterclaim for their home's value under the "betterment statute," RCW 7.28.160-.170. Br. of Appellant at 35-37. The Court of Appeals did not address this argument *Proctor v. Huntington,* 146 Wn. App. 836, 850-51, 192 P.3d 958 (2008).

Traditionally, a property owner had an absolute right to eject trespassers – and to require them to remove encroaching structures – even if the trespassers believed in good faith that the land was theirs. *See* 7 STUART M. SPEISER, CHARLES F. KRAUSE & ALFRED W. GANS, THE AMERICAN LAW OF TORTS §§ 23:9, :12, at 641, 646-47 (1990). This form of relief is a type of "property rule." *See generally* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972). Property rules are characterized by all-or-nothing relief afforded to the party who is deemed to have the legal right. *See id.* at 1105-06 (contrasting injunctive relief with an award of damages).

During the 19th and early 20th centuries, courts increasingly grappled with frustrating applications of common law property rules. Because of their absolute nature, the results sometimes seemed grossly inefficient or unfair. For example, a property rule might require a factory owner to tear down its factory because one wall of it encroached a few inches on another's lot. *See, e.g.*, *Pile v. Pedrick*, 167 Pa. 296, 31 A. 646 (1895).

To mitigate harsh or unjust results, a new form of relief gradually crept into property law: the "liability rule." A liability rule is characterized by the exchange of damages for a transfer of a legal right. *See* Calabresi & Melamed, *supra*, at 1092, 1105-06. An early case that illustrates the difference between the two types of rules is *Harrington v. McCarthy*, 169

Mass. 492, 48 N.E. 278 (1897). The cornice of McCarthy's wooden building projected 18 inches into the space above Harrington's land. *Id.* at 493. The foundation of the building also encroached slightly, but only underground. *Id.* at 494. As to the cornice, the court required McCarthy to trim back any portion of the building encroaching on Harrington's lot – a remedy reflecting a property rule. *Id.* Because the foundation would be difficult or impossible to trim back and caused no appreciable harm, however, the court refused to require McCarthy to remove the foundation and instead left Harrington to his remedy at law (i.e., damages) – a liability rule. *Id.* at 494-95. Following *Harrington*, courts occasionally began to substitute liability rules for trespass's traditional property rule in order to align case results with contemporary notions of justice. *See, e.g., Geragosian v. Union Realty Co.,* 289 Mass. 104, 108-10, 193 N.E. 726 (1935) (summarizing the scenarios in which a liability rule might apply but applying a traditional property rule).

This evolution of property law remedies can be seen in Washington precedent. Originally, a landowner could sue to eject a trespasser even if the trespasser had considerably improved on (or purchased improvements on) the land.[4] Gradually,

---

[4] See, for example, *Suksdorf v Humphrey*, 36 Wash 1, 3-6, 77 P 1071 (1904), *overruled on other grounds by Chaplin v Sanders*, 100 Wn.2d 853, 861 n 2, 676 P.2d 431 (1984), in which an encroacher's adverse possession claim failed for lack of

(Continued on following page)

liability rules began to surface in equity cases. In *Hart v. City of Seattle,* 45 Wash. 300, 301, 88 P. 205 (1907), the defendants obtained an injunction requiring the city to restore a street to its original, higher grade. The trial court gave the city the option of leaving the street at the lower grade, however, if it paid damages. *Id.* at 302-03. The city challenged this remedy, arguing that no damages could be awarded in equity cases. *Id.* at 301. Citing a large number of cases from Washington and other jurisdictions, this court approved of a liability rule as a possible remedy in equity and affirmed the trial court. *See id.* at 303.

We next applied the liability rule concept in ejectment cases. In *Bufford,* 90 Wash. at 205, the encroachers were mistakenly shown a bank-owned lot instead of their own, and so constructed their home entirely on the bank's lot. Both the bank and the encroachers paid taxes on their titles of record until the mistake was discovered and the bank sued for ejectment. *Id.* This court held that, although the encroachers' possession did not give rise to a claim for adverse possession, the bank was not entitled to eject them. *Id.* at 206-09. Under the maxim that a party requesting equity must do equity, the encroachers could remain on the land but had to deed their identical parcel to the bank in exchange for this privilege,

---

"hostility," and the court reversed a judgment in her successors' favor. This reversal allowed the landowner to eject the encroachers despite their having built a house and planted fruit trees on the disputed tract. *Id.*

or, if the bank preferred, reimburse the bank for any taxes it paid on the lot the encroachers had been occupying. *Id.* at 208-09. Thus, as in *Hart*, we applied a liability rule requiring one party to yield its absolute right to the other party in exchange for a penalty.

As with any change in bedrock property law, the introduction of liability rules was controversial. In *Tyree v. Gosa,* 11 Wn.2d 572, 573-77, 119 P.2d 926 (1941), some encroachers relied on a surveying mistake when building their homes even though the plaintiff warned them that they were trespassing on his land. The trial court refused to eject the encroachers but required them to pay the plaintiff in exchange for the land. We found this remedy unauthorized. *Id.* at 580. Ignoring *Bufford*, we stated that the parties had cited no Washington case that allowed such "balancing the equities," implying that none existed in our jurisprudence. *See id.* We further noted that the trial court's remedy, even if authorized, amounted to an unconstitutional taking of property for private use. *Id.* at 580-82. Similarly, in *Adamec v. McCray,* 63 Wn.2d 217, 219-20, 386 P.2d 427 (1963), we repeated *Tyree*'s statement that no Washington cases supported the application of a liability rule to an encroachment. In both *Adamec* and *Tyree*, we opined that other jurisdictions had applied liability rules only to encroachments of a few inches, and so the remedy did not apply to greater encroachments. *See id.*; *Tyree,* 11 Wn.2d at 580.

Adamec and *Tyree* called into question the propriety of substituting a liability rule for the

traditional property rule in encroachment cases. Reading them without reference to *Hart* and *Bufford*, which they did not address, gave the impression that liability rules might be impermissible, or permissible only in very limited circumstances.

We ultimately recognized the discrepancy in our case law and settled the point in *Arnold*. In that case, the Arnolds' house and fence encroached over the Melanis' property line because of a surveying mistake. *Arnold,* 75 Wn.2d at 145-46. The trial court held that it would be inequitable to require the Arnolds to remove their house, which was worth far more than the area encroached. It granted them the right to remain in their house on condition that they pay the Melanis for the value of the encroached land. *Id.* Surveying *Adamec*, *Hart*, *Bufford*, and *Tyree*, we upheld the trial court's equitable remedy. *Id.* at 149-53. We explained that *Adamec* did not need to address the legitimacy of recognizing a liability rule remedy because of the facts of that case. *Id.* at 149-50. We distinguished *Hart* but noted its use of a liability rule. *Id.* at 150. We approved of *Bufford*'s equitable use of a liability rule in cases of good-faith mistake. *Id. Tyree* we explained in light of its unique facts – the encroachers had notice that they might be building on another's land and took that risk when building – and dismissed its purported constitutional holding as dictum.[5] *Id.* at 150-52. Finally, we distilled

---

[5] We also refuted *Tyree's* private takings rationale *Arnold,* 75 Wn 2d at 150-52.

our cases into a test for when a court may substitute a liability rule for the traditional property rule in encroachment cases:

> [A] mandatory injunction can be withheld as oppressive when, as here, it appears . . . that: (1) The encroacher did not simply take a calculated risk, act in bad faith, or negligently, willfully or indifferently locate the encroaching structure; (2) the damage to the landowner was slight and the benefit of removal equally small; (3) there was ample remaining room for a structure suitable for the area and no real limitation on the property's future use; (4) it is impractical to move the structure as built; and (5) there is an enormous disparity in resulting hardships.

Id. at 152.

Our opinion in *Arnold* grounds this test in the general power of the court to afford equitable relief. "'[E]quity has a right to step in and prevent the enforcement of a legal right whenever such an enforcement would be inequitable.'" *Id.* (quoting *Thisius v. Sealander,* 26 Wn.2d 810, 818, 175 P.2d 619 (1946)); *accord Casa del Rey v. Hart,* 110 Wn.2d 65, 71, 750 P.2d 261 (1988); *In re Estates of Palmer,* 146 Wn. App. 132, 137 n.7, 189 P.3d 230 (2008). Importantly, we explained *Arnold*'s test as something more than merely balancing the equities. 75 Wn.2d at 152-53. Rather, it is concerned with the reasoned use of injunctive relief only when an absolute property rule is appropriate. *See id.* at 153 ("It is

a contradiction of terms to adhere to a rule which requires a court of equity to act oppressively or inequitably and by rote rather than through reason."). The dissenters complained that a court should always enforce landowners' legal rights even if doing so is inequitable, and would have stopped short of allowing a court to alter property rules through its equity power. *See id.* at 154-55 (Hill, J., dissenting). But, the majority relied on *Bufford* and *Hart*, which fashioned liability rules instead of property rules, and disapproved of dicta in *Adamec* and *Tyree*, which purported to limit or eliminate a court's ability to do so. Thus, the majority's holding confirmed that a court's equity power transcends the mechanical application of property rules. *See id.* at 152.

Proctor acknowledges *Arnold*'s holding that a court may refuse to enjoin an encroachment under certain circumstances but argues that appropriate circumstances are not present in this case. Specifically, he contends that *Arnold* does not permit a court to deny an injunction unless the damage to the landowner is "slight."[6] *See Arnold,* 75 Wn.2d at 152 (part 2 of the test). The Huntingtons put their house, garage, and well on Proctor's land, occupying a full

---

[6] The dispute over the term "slight" in *Arnold* is distinct from the question of whether an encroachment is so trifling that a court may refuse to remedy it altogether. The latter is dealt with under another doctrine: *de minimis non curat lex* (i.e., the law does not redress trifles). *See Arnold,* 75 Wn.2d at 148 (rejecting a de minimis claim separately from discussing the equitable limits on traditional property rules)

acre. Proctor argues that encroachment of an entire acre of land, worth $ 25,000, cannot be "slight" in any sense of the word. He points to cases addressing much smaller encroachments in an attempt to show that the remedy in *Arnold* is not available here. *See id.* at 145 (2-foot and 3.28-foot encroachment); *Hanson v. Estell,* 100 Wn. App. 281, 283, 997 P.2d 426 (2000) (1-foot encroachment); *Mahon v. Haas,* 2 Wn. App. 560, 563, 468 P.2d 713 (1970) (15-foot strip); *see also Adamec,* 63 Wn.2d at 219-20 (doctrine applies only to encroachments of "a few inches"); *Tyree,* 11 Wn.2d at 580 (same). *But see Bach v. Sarich,* 74 Wn.2d 575, 578, 582, 445 P.2d 648 (1968) (considering but rejecting a "balancing the equities" argument for a 130 x 77-foot encroachment).

It may be true that encroachments of only a few feet are more likely to meet the *Arnold* test than greater encroachments. However, *Arnold* relied on and derived its rule from *Bufford*, in which the encroachers occupied the landowner's entire parcel. *Arnold,* 75 Wn.2d at 150. In absolute terms, this encroachment was sizeable, and in comparative terms, this encroachment was much greater than the one in this case. The acre on which the Huntingtons built makes up only about 3.3 percent of Proctor's parcel. Since *Bufford* was a case on which *Arnold* based its test, encroachments on par with the one in *Bufford* may be said to fall within the meaning of "slight" in appropriate circumstances.

Proctor tries to distinguish *Bufford* on the ground that the landowner in that case made no

claim to its lot until after the 10-year adverse possession period had run, and so it would have been inequitable to eject the encroachers. Suppl. Br. of Pet'r at 15. Here, in contrast, Proctor sued for ejectment before the adverse possession period had run. *Id.* This distinction misses the point. *Bufford* held that the encroachers could not acquire title by adverse possession because the first few years of their possession had not been open and notorious. 90 Wash. at 206-08. It then proceeded on equitable grounds to deny the landowner's request to eject the encroachers. *Id.* at 208-09. Likewise, the Huntingtons' claim for adverse possession failed. Thus, as in *Bufford* and *Arnold*, the trial court appropriately turned to equitable considerations to determine whether an injunction should issue.[7]

Proctor argues for a hard and fast rule that unless an encroachment is "slight" in an absolute sense, a court must always grant an injunction to eject the encroacher. But, our case law affords a trial court greater flexibility. The entire purpose of our pronouncement in *Arnold* was to show that injunctions should not mechanically follow from any encroachment. *See Arnold*, 75 Wn.2d at 152

---

[7] Proctor also cites *Kent v. Holderman*, 140 Wash. 353, 354, 248 P 882 (1926) because it distinguishes *Bufford*, stating that "with respect to the facts, each case must stand upon its own bottom." But, *Kent* distinguished *Bufford* on an unrelated issue. *See id.* (holding that, unlike in *Bufford*, the encroachers had established adverse possession).

("Ordinarily, . . . a mandatory injunction will issue to compel the removal of an encroaching structure. However, *it is not to be issued as a matter of course*. . . . [T]he court must grant equity in a meaningful manner, *not blindly*." (emphasis added)). A court asked to eject an encroacher must instead reason through the *Arnold* elements as part of its duty to achieve fairness between the parties. *See Young v. Young,* 164 Wn.2d 477, 488, 191 P.3d 1258 (2008) (discussing a court's "tremendous discretion" to do justice when fashioning an equitable remedy). This is the essence of the court's equity power, which is inherently flexible and fact-specific. *See id.* at 495 ("[F]lexibility is crucial in fashioning remedies that do equity to the parties.").[8]

Here, although encroachment on an acre of Proctor's land (worth $ 25,000) was not "slight" in an absolute sense, that was not the key question before

---

[8] The same reasoning forecloses Proctor's other argument, that an encroacher cannot establish a disparity of hardships if he or she does not counterclaim under the betterment statute, RCW 7 28 160-.170 The betterment statute predates *Bufford* and *Arnold*, so the equitable rule announced in those cases presumably accounts for its existence *See* RCW 7.28.160- 170 (enacted in 1903) *Arnold* disapproves of the rote issuance of a mandatory injunction, whether due to a failure to counterclaim for the value of improvements or upon the mere showing of encroachment. A court sitting in equity may consider one party's failure to pursue all possible legal remedies, but the point is to reason through the *Arnold* factors in light of *all* the facts as part of the equitable consideration of whether an injunction is appropriate.

the trial court. The question was whether, in equity, it would be fair and just to require the Huntingtons to remove their entire house, garage, and well – at an estimated cost of over $ 300,000 – because of both parties' good-faith surveying mistake. The benefit of removal to Proctor would be to gain an acre. (As for the house, Proctor admitted he did not know what he would do with it, seeing as he had built his own house shortly after the Huntingtons' house was constructed. RP at 810; CP at 404.) The acre of land would not appreciably increase the value or size of Proctor's parcel, which totals 30 acres.[9] On these particular facts, the trial court could fairly characterize the benefit to Proctor as minimal. In contrast, ejectment would impose a great hardship on the Huntingtons because they would have to remove and reconstruct their house and garage and drill a new well. (The loss of 1 acre of land itself would not impose hardship on the Huntingtons, as they also owned much more than 1 acre.) The trial court's equitable approach in this case fits comfortably within the good-faith-mistake line of cases, including *Arnold* and *Bufford*, in which equity allows a court to apply a liability rule in lieu of rote application of a property rule. Because the trial court's chosen remedy was proper under *Bufford* and *Arnold*, the Court of Appeals was right to affirm it.

---

[9] Considering the size of Proctor's parcel is appropriate The *Arnold* test requires courts to consider the loss to the landowner in light of the "remaining room for a structure suitable for the area" and the "limitation on the property's future use." 75 Wn 2d at 152.

CONCLUSION

In upholding the equitable remedy imposed by the trial court, we recognize the evolution of property law in Washington away from rigid adherence to an injunction rule and toward a more reasoned, flexible approach. Nothing in our holding today undermines fundamental property rights: it remains true that a landowner may generally obtain an injunction to eject trespassers. Proctor does not forfeit the right to his land, nor do the Huntingtons get something for nothing. Consistent with our case law, the trial court's remedy requires the Huntingtons to pay Proctor fair market value for the land upon which they unwittingly encroached. This is exactly the sort of analysis that our precedent prescribes. We affirm the Court of Appeals.

C. JOHNSON, CHAMBERS, OWENS, and FAIRHURST, JJ., concur.

DISSENT BY: Richard B. Sanders

DISSENT

SANDERS, J. (dissenting) – I disagree with the majority on a fundamental level. The disagreement can be simply put: the majority views the test in *Arnold v. Melani*[10] as a balance of equities. It is not.

---

[10] 75 Wn 2d 143, 437 P.2d 908, 449 P.2d 800, 450 P.2d 815 (1968).

It is incorrect to view *Arnold,* 75 Wn.2d 143, solely as a balance of equities because the *Arnold* test is, first and foremost, a gatekeeper. It is a checklist of five requirements wherein *each* must be satisfied by clear and convincing evidence before a trial court can grant the "exceptional relief" of refusing to enforce a private citizen's property rights for the benefit of another private citizen. Only one requirement of the test incorporates a balance of equities, tilted in favor of the lawful landowner: the court must determine whether the encroacher has shown, by clear and convincing evidence, that "there is an *enormous* disparity in resulting hardships." *Id.* at 152 (emphasis added). The other four requirements are completely independent of any balance of equities or even any comparison between the encroacher and the landowner. *Id.* The first addresses characteristics of the encroacher; the second and third address effects on the lawful landowner; and the fourth considers whether it is practical to move the encroachment. *Id.*

Arnold permits a court to refuse to enforce a lawful property owner's private property rights – "exceptional relief for the exceptional case" – *only* when its five requirements are met. *Id.* The majority views *Arnold* as if it were a flood of equity, and thereby drowns the protection of property rights in the process. The *Arnold* court was mindful of equity, but *Arnold* is not an all-access equity pass. It formulates a *narrow exception* to the *rule* that property rights are enforced. *Arnold*'s first allegiance is to "the protection

of the concept of private property" as a "'sacred' right [that] exists in a free society." *Id.*

The *Arnold* court was not bashful in its protection of private property rights. An encroacher must prove *each* of the five requirements by clear and convincing evidence:

> (1) The encroacher did not simply take a calculated risk, act in bad faith, or negligently, willfully or indifferently locate the encroaching structure; (2) the damage to the landowner was slight and the benefit of removal equally small; (3) there was ample remaining room for a structure suitable for the area and no real limitation on the property's future use; (4) it is impractical to move the structure as built; and (5) there is an enormous disparity in resulting hardships.

Id.

Here, Robert and Christine Huntington did not, and cannot, prove the second and third requirements by clear and convincing evidence. The trial court erred by refusing to enforce Proctor's property rights.

Second *Arnold* requirement

The Huntingtons failed to prove the second requirement by clear and convincing evidence: "the damage to the landowner was slight and the benefit of removal equally small." *Id.* Whether we turn to case law or common sense, Proctor lost an entire acre

of land. The loss of one acre – 43,560 square feet – is not "slight," nor would the benefit of its return be equally small.

Previous decisions measured "slight" losses in inches or a few feet – not 43,560 square feet. *See Arnold,* 75 Wn.2d at 145 (an encroachment of 10 feet); *Hanson v. Estell,* 100 Wn. App. 281, 288-89, 997 P.2d 426 (2000) (a barn encroached upon 1 foot of property); *Holmes Harbor Water Co. v. Page,* 8 Wn. App. 600, 601-02, 508 P.2d 628 (1973) (a house exceeded the maximum height under a restrictive covenant by 4 inches to 2.6 feet); *cf. Adamec v. McCray,* 63 Wn.2d 217, 219-20, 386 P.2d 427 (1963) (rejecting a balance of equities but noting that cases where the doctrine is applied deal with encroachments of "a few inches").

And that conforms to both common sense and the English language. "Slight" is "small of its kind or in amount: SCANTY, MEAGER" and "something (as an amount, quantity, or matter) that is slight or insignificant." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2142 (2002). A court might reasonably pronounce that the loss of a few inches or feet of property is insignificant. The landowner will suffer no more than slight damage from being unable to tread upon, build upon, or otherwise enjoy a few extra inches of land. Furthermore, the landowner is unlikely to benefit from return of a few inches or feet of property; the return will not affect how the landowner uses his or her land or what the landowner does on his or her property.

But an acre could provide the site for an entire homestead, as it did here. And Proctor need not develop the property to suffer its loss or benefit from its return. Whereas the damage is slight if Proctor couldn't build, hike, hunt, or bird watch on a few additional inches of property, the loss of an entire acre of property is readily noticeable. Furthermore, the acre in question here is an elevated piece of property with a commanding view of the surrounding area – a view to which Proctor no longer has access.

Because neither the loss of one acre nor the benefit from regaining it is "slight," the trial court lacked the legal authority to take Proctor's land for the Huntingtons' benefit. The resolution of this case under *Arnold* is, or rather should have been, as simple as that.

The majority makes various attempts to circumvent this rather obvious observation. None of its attempts is consistent with *Arnold*, nor do they pay any respect to the substantial protections the law previously afforded private property rights. The majority erroneously melts the second requirement, permitting only slight damage to the landowner, with the fifth requirement, which balances equities. It holds Proctor's loss is slight and the corresponding benefit from return of the acre equally slight *compared to the Huntingtons' loss if they are forced to vacate Proctor's acre of land*. Majority at 503-03.

But determining whether the Huntingtons' loss is "enormous" compared to Proctor's loss is the

fifth requirement of the *Arnold* test. *See* 75 Wn.2d at 152. The majority renders the second requirement redundant, fashioning it into a second balance of equities. It emphatically is not. The second requirement makes *no reference whatsoever* to equity or the losses of the encroacher. The second requirement is purely a question of the landowner's loss and must be proved individually by clear and convincing evidence. *See id.*

This requirement is a fundamental check on the danger posed by permitting courts to refuse to enforce property rights. Refusing to enforce a landowner's property rights when he or she stood to suffer the loss of only a few inches or feet of property is *still* an erosion of those rights, but a *slight* erosion permitted to avoid gross inequity. Refusing to enforce a landowner's right to an entire acre of land is not mere erosion; it is a judicial taking of property for private benefit. *Arnold* understood this slippery slope and protected against it; the majority's rewriting, and effective overruling, of *Arnold* slides right down that slope.

The majority then attempts to sidestep the second half of the second *Arnold* requirement, asserting Proctor would gain only slight benefit from having his acre returned because one acre would not "appreciably increase the value or size" of his remaining 29-acre parcel. Majority at 503. I confess I do not entirely understand this argument. "Appreciable" means "[c]apable of being measured or perceived." BLACK'S LAW DICTIONARY 117 (9th ed. 2009).

Returning one acre to Proctor would increase the size of his parcel by over three percent and its value by at least $ 25,000. Is that appreciable? Yes, by definition. Is it "slight"? We should all be so lucky for the return of $ 25,000 worth of property to be only a slight benefit. But if that is the majority's rationale, that Proctor has enough land or money already and thus $ 25,000 is slight *to him*, I find no legal support in *Arnold* or our case law generally to label a landowner's loss "slight" because he or she is rich. The majority's attempt to "Robin Hood" Proctor because he owns another 29 acres is outside the law.[11]

Perhaps the majority is unconcerned with Proctor's loss of an entire acre because he is being paid $ 25,000 for it – the court-determined fair market value. But that is not a valid consideration under *Arnold*. The court *always* requires the encroacher to compensate the lawful landowner for his or her lost property if that property is not returned under *Arnold*. If that compensation balances out the property loss and renders the loss or benefit from regaining the property slight, the entire second *Arnold* requirement will always be satisfied and is therefore pointless.

---

[11] Nor is this taking in the true spirit of Robin Hood, who robbed from the rich to give to the poor. Proctor, the former owner of 30 acres, is losing an acre to the Huntingtons, who already own 27 acres.

The majority's approach is also inconsistent with the nature of private property. A fundamental aspect of private property is the landowner's right to choose if he or she will sell the property and, if so, for how much. The majority cannot simply stroll through Sherwood Forest, redistribute property, and say any harm is slight if the victims are paid what the court determines is fair market value. If Proctor really valued his property only at the market value, he would have sold it already.

Moreover, money is not the real issue here. Land is unique, impossible to duplicate, and unable to be ubiquitously substituted for money. *Crafts v. Pitts,* 161 Wn.2d 16, 25-26, 162 P.3d 382 (2007). Proctor owns *that* specific one acre of property and, with it, the right not to sell it for $ 25,000 or any amount. A landowner is permitted to value his or her land independently of monetary compensation. If the majority insists on ignoring the market value of Proctor's loss when considering whether it is slight under *Arnold*, it should at least consider Proctor's loss of the value *he* places on the land.

The nonmonetary value Proctor places on his property is evident in the record. Proctor purchased his land as a quiet, secluded living environment. With the Huntingtons' home on that specific acre of Proctor's property, they are close enough to Proctor's home that he hears their dogs barking, children making noise, and the traffic to and from

their home.[12] In the majority's one-sided balance of equities, it discusses the Huntingtons' losses at length, but makes no attempt to consider the full extent of Proctor's losses. Perhaps the majority should consider the obvious: if Proctor truly does not value this one acre – if the benefit of its return would be only "slight" – why would he bother to file a lawsuit and then appeal the issue all the way to the Washington Supreme Court to get that one acre back?

Regardless of whether the majority views Proctor's loss as the objective or subjective value of

---

[12] I find no merit blaming Proctor for the loss of his seclusion because he built his home after the Huntingtons built theirs. First, Proctor chose a building site on his property as he found it. Had he known immediately the Huntingtons built their home on his property, or even built their home without having an official survey conducted first, he may have investigated further and initiated this action prior to building his home and may have even reclaimed that flat, elevated acre of property for his own home. Second, the Huntingtons must prove that Proctor would not receive even slight benefit from having his land returned. *See Arnold*, 75 Wn.2d at 152. Since moving the Huntingtons off Proctor's one acre would lessen, if not entirely remove, the noise, the Huntingtons cannot make such a showing by clear and convincing evidence.

Whether Proctor could have built his house somewhere else on his remaining 29 acres of land is immaterial. But even if it weren't, the record provides that, due to the nature of the terrain (forest, hills, and marsh areas), some if not most of the area is not suitable to build a house. Neither trial court findings nor evidence in the record demonstrates Proctor's property contained any other housing sites comparable to the one he chose; there is no basis now to infer that Proctor has other comparable alternatives.

the encroached property, that loss isn't slight and the benefit of its return is not equally slight. *See Arnold,* 75 Wn.2d at 152. The Huntingtons did not, and cannot, satisfy the second requirement – that Proctor's loss and the benefit from the acre's return is slight. *Arnold* does not permit the court to take Proctor's one acre of land.

Peoples Savings Bank v. Bufford[13]

What other wrecking ball can the majority find to smash through the barriers *Arnold* established to protect private property rights in Washington? The majority digs up a relic of a case from 1916, addressed briefly in *Arnold,* 75 Wn.2d at 150, 152. *See* majority at 501-01. But *Peoples Savings Bank v. Bufford*, the feeble champion and sole justification of the majority's position that an entire acre of land can be "slight" under *Arnold*, cannot bear the weight of the majority's desperate wishes. *See* 90 Wash. 204, 208-09, 155 P. 1068 (1916).

There, Bufford bought one city lot in a row of identical lots in Seattle, but built his house on the wrong lot by mistake. *Id.* at 204-05. Peoples Savings Bank owned the lot upon which he built his house and offered to resolve the matter by swapping the bank's deed for that property for Bufford's deed to a vacant, but otherwise identical, lot. *Id.* at 208.

---

[13] 90 Wash 204, 208-09, 155 P 1068 (1916)

Bufford refused, instead hoping to keep the lot to which he already held title and to obtain the bank's lot for free by adverse possession. *See id.* at 206-08. That didn't work. *See id.* The court resolved the matter by letting the bank have its proposed deed swap. *Id.* at 209.

Now let us be perfectly clear on this. *Bufford* is a six-page opinion from 1916, almost entirely about adverse possession, that devotes only one paragraph to a vague discussion of "equitable relief." Here it is:

> Both parties have asked for equitable relief. Each of them have asked that their title be quieted in lot five in block ten. At the beginning of the trial, appellant [Peoples Savings Bank] offered to make a deed to respondents [Bufford] for lot five in block ten in consideration of a deed to lot five in block seven. The first maxim in equity is: *He who seeks equity must do equity*. Considering that each party was acting in entire good faith, and each party has paid taxes upon their record titles during all these years; and that no claim was made to both lots by respondents until after the ten-year period after the first possession had run, we think it would be inequitable to permit appellant to oust respondents, or to permit respondents to refuse to either deed lot five in block seven or to reimburse appellant for the taxes it has paid upon the lot upon which they have erected their home. Equity will not give respondents more than they could have claimed at law if

> the mistake had been discovered in time to bring an action of ejectment.

Bufford, 90 Wash. at 208-09.

Bufford is a decision with thin analysis, issued nearly 100 years ago, stemming from very unique facts. It is not, to say the least, the paradigmatic case for the majority to expand and rewrite *Arnold*. The *Arnold* court itself cited *Bufford* for the proposition that considerations of equity and good faith mistakes were appropriate when determining whether a trespasser must be removed from the landowner's property. *Arnold*, 75 Wn.2d at 150 (citing *Bufford*, 90 Wash. at 209). *Arnold* then reasoned that *Bufford*, among other cases, "*support*[*s*] the premise that a mandatory injunction can be withheld as oppressive when . . . it appears (and we particularly stress), that [the five *Arnold* requirements are satisfied: (1) encroacher acted in good faith, (2) slight damage to landowner, (3) no real limit on landowner's future use of remaining property, (4) impractical to move encroachment, and (5) the balance of equities enormously favors encroacher]." *Id.* at 152 (emphasis added).

One could read this "support" passage to mean *the principles expressed* in *Bufford* support the *Arnold* analysis. And that is certainly the case. In its brief analysis, *Bufford* mentions both good faith and equity as grounds upon which it forgoes ejecting Bufford from the Peoples Savings Bank's lot. 90 Wash. at 208. *Arnold* adopts those as its first and

fifth requirements. *See Arnold,* 75 Wn.2d at 152. Thus, *Bufford* lends doctrinal *support* to *Arnold*. *See id.* This interpretation of "support" is untroubled by the fact that *Bufford* did not raise, address, or accept the other three requirements set forth in *Arnold*.

But the majority reads the statement in *Arnold*, that *Bufford* "supports" the standard set forth, to mean that if applied, the facts in *Bufford* would satisfy the five *Arnold* factors: particularly relevant here is that the landowner suffered only "slight" damage and would receive "slight" benefit upon return of the encroached property. The majority then concludes that because *Bufford* involved an *entire* parcel of property, instead of an entire acre of a 30-acre property, the amount of lost property that can constitute "'slight'" damage to the landowner under the second *Arnold* requirement is up to and including the landowner's entire property. Majority at 502.

There are two problems with this extrapolation from *Bufford*. *Bufford* didn't apply all five of the *Arnold* factors. It is irresponsible for the majority to attempt to add meat to the decayed bones of *Bufford*; the *Bufford* court did not consider three of the factors, nor did it develop an evidentiary record for us to do so now.

But if the majority insists playing Dr. Frankenstein, a resurrected *Bufford* does not support the majority's claim that *Arnold* permits a trial court to take Proctor's acre of property. The facts of *Bufford* are easily distinguishable. The *Bufford* court's focus

was whether it was equitable for the bank to give up its lot *in exchange for an essentially identical lot*. 90 Wash. at 208-09. The damage to the bank was "slight" and the benefit of the return of its original lot equally "slight" because the bank would receive one of two essentially identical lots regardless of the outcome. *See Arnold*, 75 Wn.2d at 152. Here, Proctor is not receiving essentially identical land in exchange, but rather the court-determined market value of his property. The difference (and ensuing damage and benefit) is not "slight" and the "remedy" forced on Proctor ignores the uniqueness of land and the inability to substitute it uniformly for money. *See Crafts*, 161 Wn.2d at 25-26.

Furthermore, in *Bufford* the bank suggested the exchange at the beginning of the trial. 90 Wash. at 208. Where the bank expressed that it would accept the deed swap, and assuming the obvious – that the bank would not volunteer to damage itself or sustain unnecessary losses – the *Bufford* court could have reasonably assumed the bank viewed its own damage as "slight." Again, Proctor emphatically states and discusses why his losses are not "slight." Ultimately, *Bufford* was driven by its unique facts and does not justify the majority's expansion of *Arnold*.

Third *Arnold* requirement

The Huntingtons also fail to prove the third *Arnold* requirement by clear and convincing evidence:

"there was ample remaining room for a structure suitable for the area and no real limitation on the property's future use." *Arnold,* 75 Wn.2d at 152. Failure to prove any *Arnold* requirement precludes the trial court from refusing to enforce Proctor's property rights. *Id.*

The majority might[14] argue Proctor's remaining 29 acres still permit him to build a house and thus there is "ample remaining room for a structure suitable for the area." *However*, further consideration highlights the *Arnold* test was not fashioned to address encroachments over a few inches or feet – i.e., those failing the second requirement. The acreage in that area – both that of Proctors and the Huntingtons – is heavily forested, hilly, and contains some marshland. There are a limited number of areas on which are flat enough to reasonably build a house. Yes, Proctor was able to build his home on a portion of his remaining 29 acres. However, the Huntingtons' one acre encroachment prevented him from building anything on the elevated lookout upon which the Huntingtons' house is located. It also put a "real limitation" on the future use of his property because he is prevented from enjoying a *unique*, one-acre piece of his property – whether he ultimately decided to build on that elevated patch of land, or he chose

---

[14] The majority all but ignores the third requirement, referencing it only to attempt to justify its misguided Robin Hood theory under the second requirement *See* majority at 503 n.9

instead to use it for hiking, camping, bird-watching, hunting, or just quiet meditation.

The third requirement makes sense when we address minor encroachments; Proctor would not have any real limitations on using his property if he lost a few feet of that elevated land. His inability to hike, camp, or build part of a structure on those few feet would be of little consequence. It would be no real limitation if, for example, Proctor's hike to that boundary of his property was cut eight inches short.

But now that the majority has stretched permissible encroachments to an entire acre, the third requirement just doesn't fit. It is a "real limitation" on the future use of property if the encroachment occupies a piece of property so large that Proctor loses the potential site for an entire homestead – in an area where not all property is fit for building a home. And the limitations are not simply on development. Proctor is unable to hike an additional acre of his property to enjoy the lookout that acre affords. He is unable to camp there, hunt there, or use the entire acre of land for any other activity he might enjoy.

The third requirement is awkward to apply here because the loss of an entire acre of land should have already been weeded out by the second *Arnold* requirement. In any event a similar analysis under the second requirement makes it equally obvious that Proctor has a real limitation placed upon his property's future use when he loses an entire acre of land

suitable for development or to be enjoyed in its natural state.

Conclusion

Arnold wrote a *narrow* exception to Washington's historically ironclad protection of private property rights. *Arnold* was never a grant of unbridled equity; it was not created as some sort of supercharged judicial eminent domain where courts can transfer property rights from one private citizen to another based upon the court's determination of which party wants or needs it more. A court's authority to judicially take private property from the lawful landowner for the benefit of an encroacher severely erodes the concept of private property rights – and the *Arnold* court knew it. The bar for an encroacher to obtain land through equity is therefore high: the encroacher must prove, by clear and convincing evidence, each of the five *Arnold* requirements. An encroacher demonstrating he or she will suffer an enormous hardship if ejected speaks to only *one* of those requirements.

Or, so it was. The majority extends the balance of equities to all the *Arnold* requirements; this misreading of *Arnold* is tantamount to overruling it. And I do not envy the trial courts that will have to apply the majority opinion – the "new *Arnold*." Whereas *Arnold* provided five clear, independent requirements, the majority has chopped up those requirements and boiled them together into

an indistinguishable equity-sludge – and, to mix metaphors, has knocked down wall upon wall of private property protections in the process.

The moral of this story should be: before you build, *especially* near a property line, get a survey.

Because the majority effectively overrules *Arnold*, dissolving *Arnold*'s strong protection of private property rights, I dissent.

MADSEN, C.J., and ALEXANDER and J.M. JOHNSON, JJ., concur with SANDERS, J.

NOEL PROCTOR, *Appellant*, v.
ROBERT HUNTINGTON ET AL., *Respondents*.

No. 36087-0-II

COURT OF APPEALS OF WASHINGTON, DIVISION TWO

146 Wn. App. 836; 192 P.3d 958; 2008 Wash. App. LEXIS 2303

September 23, 2008, Filed

COUNSEL: *Philip A. Talmadge* and *Emmelyn Hart-Biberfeld* (of *Talmadge/Fitzpatrick*); and *Ross R. Rakow* (of *Ross R. Rakow*), for appellant.

Bradley W. Andersen and *Phillip J. Haberthur* (of *Schwabe Williamson & Wyatt*), for respondents.

JUDGES: Authored by David H. Armstrong. Concurring: J. Robin Hunt, Joel Penoyar.

OPINION BY: David H. Armstrong

OPINION

ARMSTRONG, J. – In 1994 and 1995, Robert and Christina Huntington and Noel Proctor bought adjacent, multiacre parcels of undeveloped land on which they constructed homes. In 2004, they discovered that the Huntingtons' home and other improvements, which take up nearly an acre, are entirely on Proctor's property because of a misunderstanding regarding the boundary marker on the north side of their properties. Proctor sued to eject the Huntingtons and to require them to remove

the improvements. He also revoked permission he had given the Huntingtons to construct and use a driveway over his property. The Huntingtons counterclaimed (1) to quiet title in themselves under adverse possession and estoppel in pais theories and (2) for an easement to the driveway. Although the trial court ruled that the Huntingtons had not proved adverse possession or estoppel in pais, it denied Proctor an injunction to remove them. Instead, it ordered the Huntingtons to pay Proctor $ 25,000 in exchange for a boundary adjustment giving them title to the acre on which their improvements stood. The trial court also concluded that the Huntingtons had held a revocable license, not an easement, to the driveway and ordered them to cease using it.

Proctor appeals the trial court's forced sale remedy and its admission of certain expert testimony. The Huntingtons cross-appeal the trial court's denial of their claims for estoppel in pais and for the easement to the driveway. We affirm.

FACTS

This case concerns a disputed boundary line between two large properties in Skamania County. Both lots were originally owned by Dusty Moss, who sold the eastern lot to Robert and Christina Huntington and the western lot to Noel Proctor. At the time, both lots were undeveloped.

Before Robert[1] bought his property in January 1994, Moss walked him through it and showed him the property lines generally. The northern boundary was marked by a metal fence, and Moss showed Robert a fence post on that fence that marked the northwest corner of his parcel. Six months after purchasing the property, Robert set up a campsite on what he thought was his property but was actually part of the 30-acre parcel that Proctor later purchased. The Huntingtons lived in that campsite during the summer of 1994, but they were absent from September 1994 to April 1995. Meanwhile, Proctor purchased the 30-acre parcel in February 1995, after having been shown the same general boundaries by Moss. After the Huntingtons moved back to their campsite in April 1995, Proctor introduced himself to them, not realizing that they were on his property.

The Huntingtons chose a site on which to build a home that summer, and they needed an access road over Proctor's property. Robert testified that he asked Proctor for permission to build a permanent driveway across Proctor's land as an offshoot from the access road. Proctor gave his permission to build the road on the condition that Robert construct a gate and share the costs of maintaining the shared part of the road. But he testified that he thought the road

---

[1] When referring to Robert Huntington, we use his first name

was to be temporary while the Huntingtons built their home; the property already had another driveway that he thought they would use as their permanent driveway. The Huntingtons believed that the agreement was for a permanent road or easement but they did not ask for a written easement at the time. In later years, they repeatedly asked Proctor for a written easement, but Proctor refused.

Robert testified that before he started building the road, he wanted to verify how much of it would be on Proctor's property and how much would be on his. He testified that by chance, he encountered Dennis Peoples, the surveyor for the region, along the northern boundary of the property. Robert asked Peoples to confirm the northwest corner of his property, and Peoples mistakenly pointed out a marker, now referred to as the "16th pin," that is about 400 feet west of the true boundary.[2] Report of Proceedings (RP) at 212. Robert also testified that he showed Proctor the 16th pin and told him that Peoples had confirmed it as the boundary marker between their properties.[3] Reassured that their desired homesite was on their property, the Huntingtons built the driveway as well as a house, well, garage, and garden.

---

[2] Peoples had placed this marker for the benefit of the logging operation conducted on the property on the other side of the fence.

[3] Proctor denied at trial that this meeting ever took place.

In spring 2004, Proctor hired a different surveyor, Richard Bell, to locate the corners of his property because he was concerned about a possible encroachment by a different neighbor. After completing the survey, Bell discovered that the Huntingtons' house, well, garage, yard, and driveway were located entirely on Proctor's property. Proctor sent the Huntingtons a letter withdrawing his permission for them to use their driveway, then brought this action for timber trespass, quiet title, ejectment, and a restraining order against trespass by the Huntingtons. The Huntingtons counterclaimed to quiet title to the disputed area and for an easement for their driveway.

During trial, Proctor moved to exclude the testimony of the Huntingtons' two expert witnesses regarding the costs and difficulty of removing the Huntingtons' improvements from the land and returning the land to its previous condition. The trial court denied the motion, ruling that the testimony might help it fashion an equitable remedy.

The trial court ruled that Proctor gave the Huntingtons an oral license, not an easement, to build and use the driveway across his property. As such, Proctor had a right, at any time, to withdraw his permission. It ordered the Huntingtons to cease using the driveway before June 1, 2007, a deadline that would give them sufficient time to construct a new driveway across their own property.

The trial court also rejected the Huntingtons' estoppel in pais claim, ruling that they had failed to prove the elements by clear and convincing evidence. As such, their improvements were on Proctor's property.[4] But the trial court denied Proctor's requests for a mandatory injunction, ejectment, and damages for trespass. It concluded that requiring the Huntingtons to move their home and other improvements to another location would be oppressive, unduly costly, and inequitable because:

> 1) The Huntingtons did not act in bad faith, negligently or willfully, when they chose to build their home on a location that was later discovered to be on Mr. Proctor's property;
>
> 2) the Huntingtons acted reasonably and in good faith when they ascertained the boundaries of their property;
>
> 3) the damage to Mr. Proctor is slight and the benefit of removing the house is equally small;
>
> 4) there are no real limitations on Mr. Proctor's future use of his property in permitting the Huntingtons to retain their home in its current location;

---

[4] The court had previously dismissed the Huntingtons' adverse possession claim, finding that they had failed to meet all of the elements under RCW 7 28 085.

> 5) it would be impractical and unduly expensive to remove the structure; and
>
> 6) there would be an enormous disparity in resulting hardships if the Huntingtons were required to move their home.

Clerk's Papers (CP) at 229.

The trial court ordered the Huntingtons to pay Proctor $ 25,000[5] for an adjustment of the boundary line, giving the Huntingtons the acre on which their house, garage, yard, and well were located. It also ordered that the parcel be configured, if possible, to include a new driveway approach for the Huntingtons' homesite. Both parties appeal.

The principal issues on appeal are whether the trial court erred in finding that the Huntingtons failed to prove estoppel in pais by clear and convincing evidence and in fashioning a remedy that forced Proctor to sell the disputed land to the Huntingtons.

ANALYSIS

We review a trial court's findings of fact for substantial supporting evidence in the record. If the evidence supports the findings, we then consider whether the findings support the court's conclusions

---

[5] An expert appraiser, Jim Lyons, testified that this was the fair market value for a one-acre parcel of Proctor's property if conveyed by a boundary line adjustment to the Huntingtons. The trial court explicitly found Lyons to be credible.

of law. *See Landmark Dev., Inc. v. City of Roy,* 138 Wn.2d 561, 573, 980 P.2d 1234 (1999). "Substantial evidence" is a quantum of evidence sufficient to persuade a rational, fair-minded person that the premise is true. *Sunnyside Valley Irrigation Dist. v. Dickie,* 149 Wn.2d 873, 879-80, 73 P.3d 369 (2003). If this standard is met, we will not substitute our judgment for that of the trial court. *Sunnyside Valley Irrigation Dist.,* 149 Wn.2d at 879-80. We review the trial court's legal conclusions de novo. *Sunnyside Valley Irrigation Dist.,* 149 Wn.2d at 880.

We first consider the Huntingtons' cross appeal of the trial court's conclusion that they failed to prove estoppel in pais by clear and convincing evidence.

I. Estoppel In Pais

Estoppel in pais requires the claimant to prove that (1) the owner made an admission, statement, or act inconsistent with a claim afterward asserted; (2) the other party acted on the faith of such admission; and (3) allowing the owner to contradict or repudiate his admission, statement, or act would result in injury to the other party. *Thomas v. Harlan,* 27 Wn.2d 512, 518, 178 P.2d 965 (1947). Because this doctrine estops an owner from asserting legal title to real property, we require proof by "'very clear and cogent evidence.'" *Sorenson v. Pyeatt,* 153 Wn.2d 523, 539, 146 P.3d 1172 (2006) (quoting *Tyree v. Gosa,* 11 Wn.2d 572, 578, 119 P.2d 926 (1941)).

The Huntingtons base their claim on the meeting that they asserted occurred between Robert and Proctor at the 16th pin in 1995. The trial court found that at that meeting, Robert told Proctor that Peoples had told him the pin was his northwest corner and Proctor "did not offer any protest." CP at 226. The trial court found, however, that the Huntingtons proved Proctor's acquiescence to the boundary by only a preponderance of the evidence, not by clear and convincing evidence.

The trial court, not a reviewing court, determines whether evidence meets the "clear, cogent, and convincing" standard of persuasion, which is met if the evidence makes the fact in issue "'highly probable.'" *Endicott v. Saul,* 142 Wn. App. 899, 910, 176 P.3d 560 (2008) (quoting *Colonial Imps., Inc. v. Carlton Nw., Inc.,* 121 Wn.2d 726, 735, 853 P.2d 913 (1993)). This determination "'necessarily requires a process of weighing, comparing, testing, and evaluating – a function best performed by the trier of the fact, who usually has the advantage of actually hearing and seeing the parties and the witnesses, and whose right and duty it is to observe their attitude and demeanor.'" *Endicott,* 142 Wn. App. at 910 (quoting *Bland v. Mentor,* 63 Wn.2d 150, 154, 385 P.2d 727 (1963)). Here, Robert testified that the meeting occurred; Proctor testified that it did not. Although the trial court accepted Robert's version of the incident, it acted well within its discretion in concluding that because of the dispute, the Huntingtons had not proved the incident by clear and convincing evidence.

See Hovila v. Bartek, 48 Wn.2d 238, 241, 292 P.2d 877 (1956) (where the evidence is closely conflicting or equally balanced, trial court's findings will not be disturbed).

II. Remedy

Proctor argues that the trial court abused its discretion by refusing to order the Huntingtons to remove their encroachments and by instead granting them title to the property.

A. Denying Mandatory Injunction

Generally, courts will order an encroacher to remove encroaching structures even though it is extraordinary relief.[6] *Arnold v. Melani*, 75 Wn.2d 143, 152, 449 P.2d 800 (1968); *Hanson v. Estell*, 100 Wn. App. 281, 287-88, 997 P.2d 426 (2000). But we have recognized an exception where such an order would be oppressive. *See Arnold*, 75 Wn.2d at 152. To trigger the exception, the encroacher must prove by clear and convincing evidence that (1) he did not simply take a calculated risk or act in bad faith, or act negligently, willfully, or indifferently in locating the encroaching structure; (2) the damage to the landowner is slight

---

[6] A mandatory injunction is also often an appropriate remedy for violation of a restrictive covenant, but because such violations do not involve actual encroachments of real property, we disregard the parties' extensive citations to restrictive covenant cases.

and the benefit of removal equally small; (3) there is ample remaining room for a structure suitable for the area and there is no real limitation on the property's future use; (4) it is impractical to move the encroaching structure as built; and (5) there is an enormous disparity in the resulting hardships. *Arnold*, 75 Wn.2d at 152; *Hanson*, 100 Wn. App. at 288. The *Arnold* court emphasized that this exception is specifically intended for the "circumstance in which one party uses a legal right . . . as a weapon of oppression rather than in defense of a right." *Arnold*, 75 Wn.2d at 153.

In this case, the trial court concluded that all five of these elements were met. Proctor challenges the first, second, and fifth elements.

1. First Element – Negligent Encroachment

Proctor argues that the Huntingtons failed to satisfy the first element of the *Arnold* test because they took a calculated risk or acted negligently or indifferently when locating their encroachments. He maintains that in its oral ruling, the trial court "specifically found [that] the Huntingtons were negligent" even though it later declined to enter a written finding to that effect. He also contends that the court ignored "considerable testimony" that (1) neither Peoples nor Proctor met with Robert at the 16th pin and (2) Peoples did not even set the 16th pin until after the meeting allegedly took place. Br. of Appellant at 31-32.

Proctor's first argument fails for two reasons. First, the evidence supports the trial court's written findings and they adequately resolve all critical disputes; we do not look beyond them. *In re Det. of Smith,* 117 Wn. App. 611, 615, 72 P.3d 186 (2003). Second, the court's "finding" of negligence was hesitant at best: it stated, "[The Huntingtons] perhaps were negligent in fully ascertaining where their boundaries were. However, I do believe that they did in good faith rely on the 16th pin thinking that that was their boundary." RP at 926-27. When Proctor explicitly requested the court to enter a written finding that the Huntingtons were negligent, it declined to do so. The trial court's off-handed comment does not undermine its ultimate conclusion that the Huntingtons acted reasonably in locating their property.

Nor are we persuaded by Proctor's argument that the court "ignored testimony" by Proctor and Peoples that the meetings at the 16th pin never occurred. Br. of Appellant at 32. Robert testified that they did occur, and we defer to the trier of fact on issues of conflicting testimony and the credibility of witnesses. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004). Substantial evidence supported the trial court's finding.

2. Second Element – Slight Damage to Landowner

Proctor argues that the Huntingtons failed to establish the second element of the *Arnold* test for

an exception to enjoining an encroacher: that the damage to the landowner is "slight."

To satisfy the "slight" harm requirement, the encroachment need not be so small as to be de minimis. *See Arnold,* 75 Wn.2d at 148. For instance, in *Arnold,* the defendant's house encroached onto the plaintiff's land by about three feet and his fence encroached by about nine feet along the boundary; the court held that this invasion was "something more than a trifle" but still of only slight harm to the plaintiff. *Arnold,* 75 Wn.2d at 148, 152. In *Hanson,* the only other published case applying the *Arnold* exception, the encroachment onto the plaintiff's land was one foot, which the court held to have a "negligible impact" on the plaintiff. *Hanson,* 100 Wn. App. at 288-89.[7]

Here, the Huntingtons' improvements do not extend slightly beyond the boundary line with

---

[7] Proctor also cites several cases from other jurisdictions to argue that *Arnold* applies to only slight encroachments. *See Stuttgart Elec. Co. v. Riceland Seed Co.*, 33 Ark. App. 108, 115, 802 S.W.2d 484 (1991) (warehouse encroached 2.3 feet onto neighboring property); *Golden Press, Inc. v. Rylands,* 124 Colo. 122, 128-29, 235 P.2d 592 (1951) (footings seven feet below surface of ground encroached by about three inches); *Zerr v. Heceta Lodge No. 111,* 269 Or. 174, 185, 523 P.2d 1018 (1974) (encroachment of nine inches, no mandatory injunction where no substantial damages); *cf. Goulding v. Cook,* 422 Mass. 276, 279-80, 661 N.E.2d 1322 (1996) (while Massachusetts courts will not enjoin "truly minimal encroachments," injunction to remove septic system taking up a "spatially significant portion of the plaintiffs' lot" was upheld).

Proctor's land; they are entirely on Proctor's land. Moreover, the improvements take up nearly an acre of that land; the house alone has a 1,650 square-foot footprint. But although the Huntingtons' encroachment does not fit within the slight encroachment illustrated by *Arnold* and *Hanson,* the *Arnold* court specifically cited *Peoples Savings Bank v. Bufford,* 90 Wash. 204, 155 P. 1068 (1916), as support for its premise that the court is not required to issue an oppressive injunction, and as support for its five-part rule setting the parameters of the exception. *Arnold,* 75 Wn.2d at 152. In *Bufford,* as here, the encroacher built his home on the wrong lot in a subdivision. *Bufford,* 90 Wash. at 204-05. When the true owner discovered the situation, it sued to eject the encroacher, who raised the defense of adverse possession. *Bufford,* 90 Wash. at 205. The Supreme Court held that the evidence was insufficient to show the encroacher's open hostile possession for the required 10 years, but it nonetheless refused to quiet title in the true owner because "it would be inequitable to permit [the title owner] to oust [the encroacher]." *Bufford,* 90 Wash. at 209. The court then fashioned an equitable remedy allowing the title owner to take either the encroacher's lot in the same addition or a refund of the taxes the title owner had paid on the disputed lot. *Bufford,* 90 Wash. at 209.

The Supreme Court has never overruled *Bufford.* In fact, it has cited the case a number of times for its discussion of what evidence is sufficient to show a hostile possession. And in *Skoog v.*

Seymour, 29 Wn.2d 355, 363-64, 187 P.2d 304 (1947), *overruled on other grounds by Chaplin v. Sanders,* 100 Wn.2d 853, 676 P.2d 431 (1984), the court acknowledged *Bufford*'s equitable remedy and noted that the case was "a most unusual one on its facts." The same unusual facts exist here. The Huntingtons, acting in good faith and without negligence, constructed their home entirely on Proctor's property. Although we cannot reconcile this with the slight encroachments of *Arnold* and *Hanson,* neither can we reconcile *Bufford* with those encroachments. And, because the Supreme Court cited *Bufford* as support for its five-part test in *Arnold,* we cannot conclude that *Bufford* is no longer good law. In short, *Bufford* supports the trial court's equitable remedy even though the Huntingtons did more than slightly encroach on Proctor's property.

3. Fifth Element – Disparity in Resulting Hardships

Proctor argues that the trial court erred in concluding that there was an "enormous disparity" between his hardship in keeping the Huntingtons' improvements on his land and the Huntingtons' hardship in removing them. He asserts that his land is designated as forest land for tax purposes, which requires that a certain number of his total acres be devoted to forestry activities. Thus, according to Proctor, the acre of land taken up by residential improvements subtracts from his available non-forestry acreage allowance and limits what he can do

with the rest of the land. In addition, having two residences on the property instead of one endangers the forestry designation altogether.

Proctor's arguments are speculative. At trial, he acknowledged that he still maintains his forestry tax designation, and he presented no evidence of any specific plans for the rest of his property that were thwarted by the Huntingtons' improvements on the property. Furthermore, even if Proctor's tax designation were eliminated, his hardship would be monetary in nature and therefore subject to legal remedies without the need for a mandatory injunction. *See Kucera v. Dep't of Transp.*, 140 Wn.2d 200, 209, 995 P.2d 63 (2000) ("[I]njunctive relief will not be granted where there is a plain, complete, speedy and adequate remedy at law."). In contrast, the Huntingtons' hardship from the mandatory injunction would be considerable because it would require them to destroy their sizeable family home and build elsewhere. In sum, the trial court properly considered Proctor's arguments and properly found an enormous disparity between the parties' hardships.

B. Alternate Remedy/Granting Title

Proctor argues that even if the *Arnold* doctrine applies to this case, the trial court erred in imposing the remedy of a forced sale of the disputed property.

In *Arnold,* the court granted the defendant an easement for the area covered by his encroachments as long as he paid the plaintiff the value of the land as *damages. Arnold,* 75 Wn.2d at 153. Unlike this case, title did not change hands. In fact, the court specifically ordered that while the defendant could repair his existing encroachments, any replacement of those improvements must be within his own lot. *Arnold,* 75 Wn.2d at 153. But our facts are unlike those in *Arnold* where the encroachment was minor. Rather, as we have discussed, the facts here are most like *Bufford* – a home and other improvements built entirely on another's property. Under these circumstances, an easement is not workable, and the trial court's boundary adjustment was an appropriate remedy.

III. Expert Testimony

Proctor argues that the trial court abused its discretion by admitting expert testimony regarding the value of the disputed property and the costs of moving the Huntingtons' improvements. He argues that the only possible relevance of this testimony was to the "balancing the equities" inquiry; therefore, the court's decision to admit the evidence "was tantamount to a finding before the conclusion of Proctor's case that it would be inequitable to eject the Huntingtons from the disputed parcel." Br. of Appellant at 38.

We review a trial court's evidentiary rulings for an abuse of discretion. *In re Pers. Restraint of Davis,* 152 Wn.2d 647, 691, 101 P.3d 1 (2004). A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons, i.e., if the court relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law. *State v. Lord,* 161 Wn.2d 276, 283-84, 165 P.3d 1251 (2007). The trial court did not abuse its discretion here. Even if the court had denied the Huntingtons equitable relief, they were entitled to ask for the relief and to present evidence to support it.

IV. Driveway Easement

The Huntingtons contend that the trial court erred by finding that they had merely a license and not an easement for their driveway across Proctor's land.

Licenses and easements are distinct in principle. 25 Am. Jur. 2d *Easements and Licenses in Real Property* § 2 (2004). The basic difference is that an easement is a right and a license is a privilege. 17 William B. Stoebuck & John W. Weaver, Washington Practice: Real Estate § 2.1, at 82 (2d ed. 2004). Unlike an easement, a license is revocable, nonassignable, and created by the licensor's oral, written, or implied consent. *Conaway v. Time Oil Co.,*

34 Wn.2d 884, 894, 210 P.2d 1012 (1949); *Showalter v. City of Cheney,* 118 Wn. App. 543, 548, 76 P.3d 782 (2003). An easement is a property right, albeit distinct from ownership, to use another's land. *Dickson v. Kates,* 132 Wn. App. 724, 731, 133 P.3d 498 (2006). And because easements are "'encumbrance[s] upon real estate,'" any contract creating or evidencing an easement must be in writing and comply with the statute of frauds set forth in RCW 64.04.010. *Berg v. Ting,* 125 Wn.2d 544, 551, 886 P.2d 564 (1995) (quoting RCW 64.04.010).

Here, because no deed establishes an easement, the Huntingtons assert that the doctrines of part performance and estoppel entitle them to specific performance of an *agreement* to create such an easement.[8] But these doctrines apply only if Proctor agreed to convey an easement as opposed to a license. *See Adler v. Fred Lind Manor,* 153 Wn.2d

---

[8] Under the doctrine of part performance, a court may specifically enforce an oral agreement to convey an estate in real property if there is sufficient part performance of the agreement *Berg*, 125 Wn 2d at 556 (citing *Miller v McCamish*, 78 Wn 2d 821, 826, 479 P 2d 919 (1971)). Equitable estoppel applies where there has been an admission, statement, or act that has been justifiably relied on to another party's detriment *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 362-63, 103 P.3d 773 (2004). Some commentators have noted that the estoppel doctrine is often confused with the part performance doctrine because they arise out of essentially the same fact pattern and usually may be used interchangeably. 17 STOEBUCK & WEAVER, *supra*, § 2 8, at 108. We need not consider the distinctions between the two doctrines because the Huntingtons fail to meet their burden on either.

331, 362-63, 103 P.3d 773 (2004); *Kirk v. Tomulty,* 66 Wn. App. 231, 237, 831 P.2d 792 (1992). If Proctor agreed to grant only a revocable license, the Huntingtons would not be entitled to an easement even if they fulfilled all their duties under the contract. *Kirk,* 66 Wn. App. at 237.

A grantor must intend to convey an easement. *M.K.K.I., Inc. v. Krueger,* 135 Wn. App. 647, 654, 145 P.3d 411 (2006), *review denied,* 161 Wn.2d 1012 (2007). Here, the trial court impliedly found that Proctor did *not* intend to create an easement when it (1) concluded that no easement existed and (2) noted that Proctor had repeatedly refused to execute a written easement. Substantial evidence supports these findings. Proctor testified that the word "permanent" never came up in his discussions with the Huntingtons; in fact, he assumed at the time that the Huntingtons would be using the driveway only temporarily during the construction of their home because they already had a permanent driveway on their own property. Furthermore, after the Huntingtons' construction was finished, Proctor repeatedly refused their requests for a written easement to the driveway. This evidence is sufficient to persuade a rational, fair-minded person that Proctor did not intend to grant the Huntingtons an easement for the driveway. *See Sunnyside Valley Irrigation Dist.,* 149 Wn.2d at 879. As a result, the most the Huntingtons were ever entitled to was a revocable license from Proctor. The trial court did not err when

it ordered the Huntingtons to cease using the driveway on Proctor's property.

V. Attorney Fees

Proctor argues that he is entitled to attorney fees under RAP 18.9 because the Huntingtons' cross appeal is frivolous. Specifically, he contends that we should sanction the Huntingtons because "Washington does not recognize an easement by estoppel and there is no clear case law supporting their arguments." Reply Br. of Appellant at 32.

An appeal is frivolous if there are no debatable issues on which reasonable minds might differ and it is so totally devoid of merit that there was no reasonable possibility of reversal. *Malted Mousse, Inc. v. Steinmetz,* 150 Wn.2d 518, 535, 79 P.3d 1154 (2003) (quoting *Fay v. Nw. Airlines, Inc.,* 115 Wn.2d 194, 200-01, 796 P.2d 412 (1990)). The Huntingtons cite several Washington cases in which easements by estoppel are discussed favorably. *See Ormiston v. Boast,* 68 Wn.2d 548, 552, 413 P.2d 969 (1966); *Canterbury Shores Assocs. v. Lakeshore Props., Inc.,* 18 Wn. App. 825, 827, 572 P.2d 742 (1977). We cannot find that the Huntingtons' cross appeal was frivolous. We deny Proctor's request for sanctions.

Affirmed.

PENOYAR, A.C.J., and HUNT, J., concur.

Review granted at 165 Wn.2d 1041 (2009).

Annotated Revised Code of Washington by LexisNexis

IN THE SUPERIOR COURT OF
THE STATE OF WASHINGTON

FOR THE COUNTY OF SKAMANIA

NOEL PROCTOR, Plaintiff, vs. ROBERT "FORD" HUNTINGTON and CHRISTINA HUNTINGTON, husband and wife and the marital community therein, Defendants,	No. 05 2 00032 7 FINAL ORDER AND JUDGMENT [Clerk's Action Required] (Filed Mar. 1, 2007)

JUDGMENT SUMMARY

Judgment Creditor:	n/a
Judgment Debtor:	n/a
Attorney for Judgment Creditor:	n/a
Principle Judgment Amount:	$0
Interest on Judgment	0%
Attorneys' Fees	0
Costs:	0

PRINCIPAL JUDGMENT SHALL BEAR INTEREST AT THE RATE OF 12% PER ANNUM UNTIL PAID IN FULL

FINAL ORDER/JUDGMENT

The Court HEREBY ENTERS JUDGMENT AS FOLLOWS:

1. Except as provided herein, each of the parties' claims and counterclaims are dismissed with prejudice

2. The Defendants are hereby declared to be the owners of the approximately 1-acre real property upon which their home, garage, well and other miscellaneous improvements or utilities are located. The Defendants are therefore declared to own the real property described in Exhibit "A" and depicted in Exhibit "B."

3. Plaintiff shall, within 30 days, execute and deliver to the Defendants or a mutually agreeable Title Company, a mutually acceptable statutory warranty deed conveying to the Defendants the real property described above. The Defendants are responsible to pay the survey and closing costs associated with describing the real property to be conveyed and to record the Deed.

4. The Defendants shall, when the Plaintiff delivers the deed, pay the Plaintiff the sum of $25,000 as the fair market purchase price of the property;

5. The Defendants shall, on or before June 1, 2007, cease using any portion of the Plaintiff's property for their driveway.

6. Any and all legal relationship between the Plaintiff and Defendants is hereby dissolved; and

5. [sic] Since neither party is deemed to have prevailed, each party shall bear their own costs and attorneys fees.

[6. [sic] Plaintiff's motion for reconsideration filed 2/26/07 is denied. ETR]

Dated this 1st day of March, 2007.

/s/ E. Thompson Reynolds
E. Thompson Reynolds
SUPERIOR COURT JUDGE

PRESENTED BY:

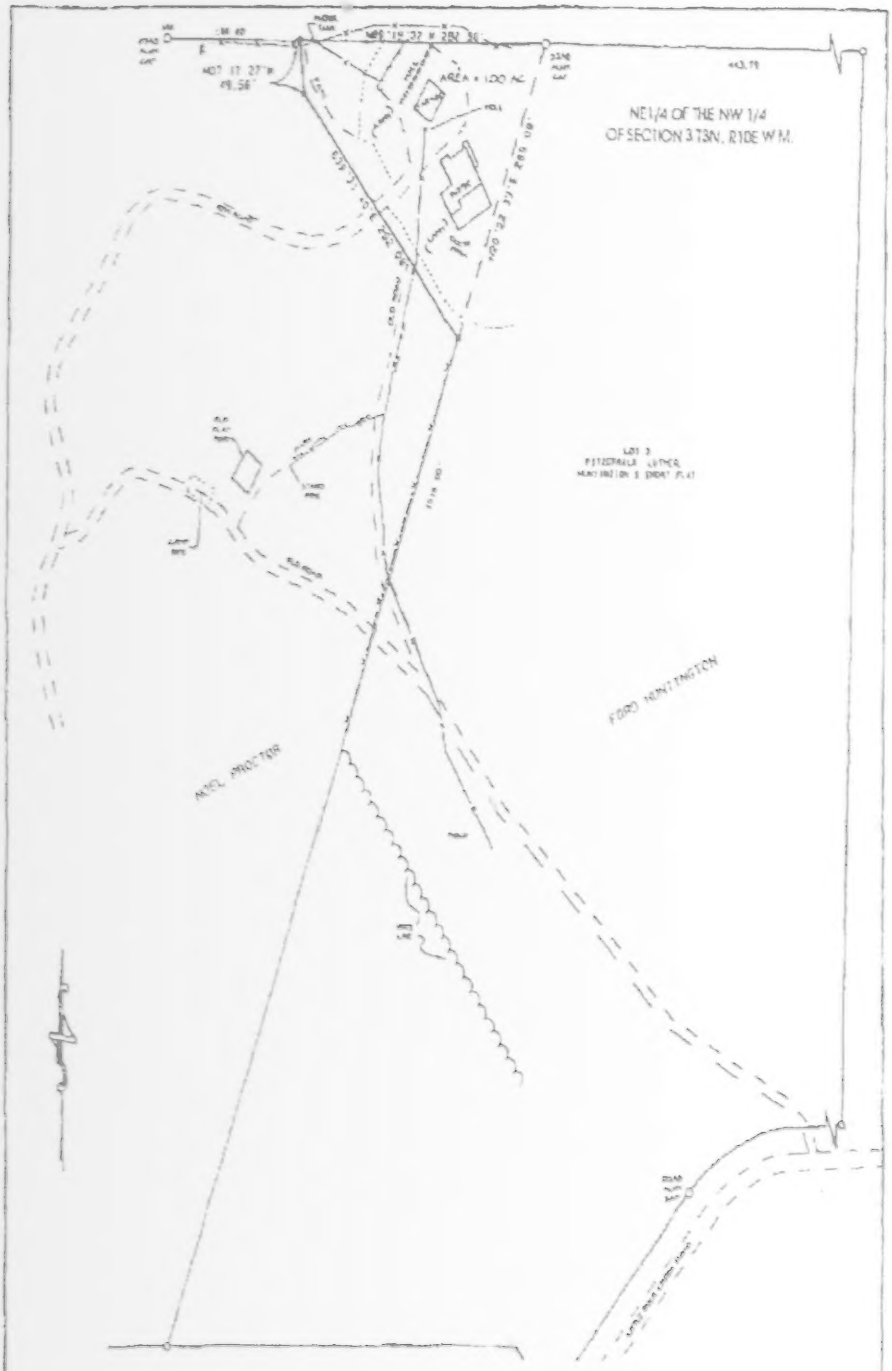
/s/ Bradley W. Andersen
Bradley W. Andersen, WSBA #20640
Attorneys for Defendants
Robert "Ford" and Christina Huntington

1.0 Acre Legal Description

Beginning at a point North 89°19'22" East, a distance of 156.00 feet from the West 1/16 Corner on the North line of Section 3, Township 3 North, Range 10 East, Willamette Meridian, Skamania County, Washington;

thence South 07°17'27" East, a distance of 49.56 feet;
thence South 39°31'40" East, a distance of 292.08 feet;
thence North 20°22'33" East, a distance of 289.08 feet to a D2AB Aluminum Cap;
thence North 89°19'22" West, a distance of 292.86 feet to the Point of Beginning.
Containing 1.00 ACRES, more or less.

EX. "A"
PAGE 1 of 1



1.0 ACRE BOUNDARY LINE ADJUSTMENT

SCALE 1"=100'

BELL DESIGN COMPANY

SITE SURVEY
FOR FORD HUNTINGTON
SKAMANIA COUNTY, WASHINGTON

SHEET 1 OF 1
PROJECT 060121
DATE Dec 2006

This is not a legal survey.

060121E3.pro

PAGE 1 of 1

App. 60

IN THE SUPERIOR COURT
OF THE STATE OF WASHINGTON
FOR THE COUNTY OF SKAMANIA

NOEL PROCTOR, Plaintiff, vs. ROBERT "FORD" HUNTINGTON and CHRISTINA HUNTINGTON, husband and wife and the marital community therein, Defendants.	No. 05 2 00032 7 FINDINGS OF FACT AND CONCLUSIONS OF LAW (Filed Mar. 1, 2007)

This cause came on for trial before the Honorable E. Thompson Reynolds on September 25, 26, 27, 2006 and November 15, 2006, The Court issued its opinion in this matter on November 17, 2006. Plaintiff appeared personally and through his attorneys Robert Stanton and Ross Rakow. Defendants Ford and Christine [sic] Huntington appeared personally and through their attorney Bradley Andersen of Schwabe, Williamson & Wyatt.

At trial, the Defendants moved, and the court allowed, the Defendants to amend their Complaint. The court dismissed the Plaintiff's timber trespass claims because it arose outside the applicable statute of limitations and dismissed the Defendants' adverse possession counterclaim. NOW, THEREFORE, the

Court makes the following Findings of Fact and Conclusions of Law.[1]

FINDINGS OF FACT

1. Prior to 1993, Dusty Moss subdivided a large parcel of property in Skamania County. Mr. Moss hired Dennis Peoples to survey the property for the subdivision. In December of 1993, the Plaintiff, Ford Huntington, visited the property with an interest in purchasing one of the lots in Mr. Moss's subdivision. Mr. Huntington walked the property with Mr. Moss. Mr. Moss showed Mr. Huntington a 30-acre parcel, which was later purchased by Mr. Proctor (the "Proctor Parcel"), and a 27-acre parcel. Mr. Moss generally showed Mr. Huntington the property lines, including a metal fence on the north boundary of the 27-acre parcel. Mr. Moss also showed Mr. Huntington a fence post which marked the northwest corner of the 27-acre parcel. The Huntingtons purchased the 27-acre parcel (the "Huntington Parcel") from Mr. Moss on January 7, 1994.

2. In June of 1994, the Huntingtons set up a camp site and lived the rest of that summer on a portion of the Proctor Parcel [6.17 acre ETR] (the "Disputed Area"). At that time, they believed this was part of their property. In September of 1994, the

---

[1] Any Finding of Fact that should be considered a Conclusion of Law or any Conclusion of Law that should be considered a Finding of Fact are so deemed.

Huntingtons moved to Utah for the winter but returned to live on the Disputed Area the following spring (1995).

3. During the winter of 1994-1995, Noel Proctor visited the 30-acre parcel with Dusty Moss. He also walked the north boundary line with Mr. Moss. Mr. Proctor observed a pin at the northeast corner of the 30-acre parcel. On February 7th, 1995, Mr. Proctor bought the 30-acre parcel from Mr. Moss.

4. Mr. Proctor first met the Huntingtons in April of 1995, when Mr. Proctor came onto where the Huntingtons were camped and introduced himself. Mr. Proctor was aware of the camp site and did not object to their use or claim that they were on his property. Mr. Proctor did not realize that the Huntingtons were on his property.

5. [On May 23, 1995 ETR] Dennis Peoples, a surveyor, set a pin for Dusty Moss at what is considered the "16th corner" along the northern boundary line of the Proctor property. This pin was some 400 feet west of the actual corner boundary between the Proctor and Huntington properties (the northwest corner of the Huntington Property).

6. In the spring of 1995, the Huntingtons started to clear their homesite. While doing so, Mr. Huntington encountered Dennis Peoples, the surveyor, in the area. Mr. Huntington asked Mr. Peoples to confirm the northwest corner of his property. Mr. Peoples mistakenly pointed out the 16th pin and told Mr. Huntington that that was his

northwest corner. [~~This was in the same location as the corner fence post that Mr. Moss had identified to Mr. Huntington as the northwest corner of the property in 1993.~~ ETR] The Huntingtons relied upon the surveyor's confirmation of the 1/6th [sic] pin as their northwest corner, an error of some 400 feet, when they proceeded to build their home.

7. In the summer of 1995, Mr. Huntington approached Mr. Proctor for permission to construct a driveway across a portion of Mr. Proctor's property to permit the Huntingtons access to their home site. This road could have been built over the Huntington's property. However, the Huntingtons and their road construction contractor determined that a driveway across Proctor's property would provide a better driveway, and would cost less money because of the slope of the land. Mr. Proctor agreed to allow the Huntingtons to construct the road across his property on the condition that the Huntington would construct a gate across the road and also share in the cost of maintenance for that portion of the main road that the Huntingtons and the Proctors would share. The Huntingtons built their driveway across the Proctor property to their homesite in 1995 and have maintained that road ever since.

8. In June of 1995, Mr. Huntington drilled a well on the Disputed Area.

9. While the road was being constructed in the summer of 2005, Mr. Proctor and Mr. Huntington met at the 16th pin. Mr. Huntington told Mr. Proctor that

Mr. Peoples had told him that the 16th pin was his northwest corner. Mr. Proctor [~~acknowledged the pin and~~ ETR] did not offer any protest to the accuracy of the pin. In the spring and summer of 1996, and in reliance upon what both parties believed was their property, the Huntingtons built their house and garage on the Disputed Area. [designated as Forest Resource Land ETR.]

10. Between 1995 and 1997, Mr. Proctor constructed a house on his property.

11. The Huntingtons have resided full time in their home on the Disputed Area since 1996. They have also used the driveway that crosses Mr. Proctor's property as the primary access to their home. The Huntingtons repeatedly asked Mr. Proctor for a written easement for the driveway, but Mr. Proctor refused.

12. In the spring of 2004, Mr. Proctor was concerned about a possible encroachment by a neighbor to the southwest of his property. Mr. Proctor hired Richard Bell, a surveyor, to locate the corners of his property to ascertain if his neighbor to the southwest was encroaching. Mr. Bell walked the property in June of 2004 and discovered that the Huntingtons' house, well, garage, and yard were located entirely on Mr. Proctor's property. While locating Mr. Proctor's northeast corner, Mr. Bell saw Mrs. Huntington at her home. Mr. Bell asked her to identify her northwest corner. She took him to the 16th pin. Mr. Bell

informed her that the true corner was 400 feet to the east of the 16th pin. Mrs. Huntington was surprised.

13. After the encroachment was discovered, the parties attempted to settle, but were not successful. Mr. Proctor brought this action on February 16, 2005, for timber trespass, ejectment, and quiet title. The Huntingtons counterclaimed for quiet title to the Disputed Area and for an easement for their private driveway.

14. The court finds the expert appraiser Jim Lyons to be credible and finds that the fair market value for a one (1) acre parcel of the Plaintiff's property, if conveyed by virtue of a boundary line adjustment to the Defendants, is $25,000.00.

15. The Huntingtons cut down some trees on the Disputed Area for their homesite. This occurred more than seven (7) years before this lawsuit was filed.

16. In addition to the substantial emotional hardship, it would cost the Huntingtons more than $300,000.00 to move their house to another location. The Court further finds that it would be impractical to move the house.

Based on these Findings of Fact, the Court hereby makes the following

CONCLUSIONS OF LAW

A. Driveway.

1. Mr. Proctor gave the Huntingtons an oral license to build and use the driveway across his property. This was not an easement. Indeed, Mr. Proctor refused to sign a written easement that was provided to him by Mr. Huntington. The Huntingtons' use was therefore permissive and Mr. Proctor had a right, at anytime, to withdraw his permission. The Huntingtons have an alternate access. There is no necessity that they cross Mr. Proctor's property. The Huntingtons shall cease using the driveway on Mr. Proctor's land on or before June 1, 2007. This should provide the Huntingtons sufficient time to construct a new driveway across their property.

B. Disputed Area/Quiet Title.

2. Both parties were under a mutual mistake of fact. They both believed the 16th pin marked the northwest corner of the Huntington Parcel when in fact the actual corner pin was approximately 400 feet west of the 16th pin. The Huntingtons relied upon Mr. Moss, the surveyor and the boundary markers to conclude that the 16th pin was their northwest corner when they chose to build on property that turned out to be owned by Mr. Proctor. Because Mr. Proctor also believed that this property belonged to the Huntingtons, he did nothing to stop them from developing the Disputed Area. Each side's belief

about the location of the property line was a reasonable mistake.

3. The Washington Supreme Court has laid out the elements for estoppel *in* pais in *Thomas v. Harlan*, 27 Wn.2d 512, 518 (1947). The Huntingtons have proven the elements for estoppel *in pais* by a preponderance of the evidence. However, they have not met the requisite burden of clear and convincing evidence. Therefore, the Court finds that the Huntingtons' house and other improvements are located on Mr. Proctors' property and reject the Huntingtons' defenses and counterclaims based on estoppel *in pais*.

4. Plaintiff's claim for timber trespass under RCW 64.12.030 is barred by the statute of limitations.

5. The Court must now address the appropriate remedy to impose in this case. The Court, in considering the factors listed in *Arnold v. Melani*, 75 Wn.2d 143, 146 (1968), finds that requiring the Huntingtons to move their home and other improvements to another location would be oppressive, unduly costly and inequitable under the circumstances of this case. In reaching this conclusion, the Court notes the following: 1) The Huntingtons did not act in bad faith, negligently or willfully, when they chose to build their home on a location that was later discovered to be on Mr. Proctor's property; 2) the Huntingtons acted reasonably and in good faith when they ascertained the boundaries of their property; 3) the damage to

Mr. Proctor is slight and the benefit of removing the house is equally small; 4) there are no real limitations on Mr. Proctor's future use of his property in permitting the Huntingtons to retain their home in its current location; 5) it would be impractical and unduly expensive to remove the structure; and 6) there would be an enormous disparity in resulting hardships if the Huntingtons were required to move their home. Therefore, the Plaintiff's petition for a permanent injunction and ejectment is denied, along with any claims for trespass damages.

6. The boundary between the Plaintiff's and the Defendants' property is hereby adjusted so that the Defendants will acquire one (1) acre of Plaintiff's land where the Defendants' house, garage, yard, and Defendants' well are located. The Defendants shall, in consideration for the conveyance of the one (1) acre parcel, pay the Plaintiff the sum of $25,000.00, which represents the property's fair market value. The one (1) acre parcel also, if possible, should be configured to include a new driveway approach for the Defendants' homesite.

7. The new boundary line between Plaintiff's and Defendants' property is legally described as set out in the attached Exhibit "A" and depicted in the attached Exhibit "B" and may hereafter be recorded and relied upon as the legal boundary between the two parcels.

8. The Plaintiff's request for rent is denied because the Court awarded a transfer of land and the

Plaintiff did not introduce any evidence as to the rental value of the property.

9. Except as expressly provided for herein, the Plaintiff's and the Defendants' claims are denied.

10. Neither party shall be deemed the prevailing party.

Based upon the foregoing Findings of Fact and Conclusions of Law, IT IS HEREBY ORDERED AND DECREED that:

1. Except as provided below, each of the parties' claims are dismissed with prejudice.

2. The Defendants are hereby declared to be the legal owners of the real property described in Exhibit "A" and depicted on Exhibit "B".

3. The Plaintiff shall convey to the Defendants by virtue of a statutory warranty deed the one-acre parcel as described in Exhibit A" and depicted on Exhibit "B".

4. Defendants upon the delivery of the Deed into escrow, shall pay the Plaintiff the sum of $25,000.00. Defendants shall further be responsible for the costs (surveying and closing fees) associated with closing of the one-acre parcel.

5. The Defendants shall, on or before June 1, 2007, cease using any portion of the Plaintiff's property for their driveway.

6. Each party shall bear their own court costs, legal fees and attorney fees in this proceeding. Each party shall cooperate with the other to effectuate the Court's judgment, including but not limited to executing any deeds or other instruments necessary to convey the one-acre parcel.

Dated this 1st day of [March ~~February~~,] 2007.

/s/ E. Thompson Reynolds
E. Thompson Reynolds,
Superior Court Judge

Presented by:

SCHWABE, WILLIAMSON
& WYATT, P.C.

By: /s/ Bradley W. Andersen
Bradley W. Andersen,
WSBA #20640
Phillip J. Haberthur,
WSBA #38038
Attorneys for Defendants
Robert "Ford" Huntington
and Christina Huntington

THE SUPREME COURT OF WASHINGTON

NOEL PROCTOR, Petitioner, v. ROBERT "FORD" HUNTINGTON and CHRISTINA HUNTINGTON, husband and wife, and the marital community therein, Respondents.	**ORDER DENYING MOTION FOR RECONSIDERATION** No. 82326-0 C/A No. 36087-0-I Skamania County No. 05-2-00032-7 (Filed Nov. 4, 2010)

The Court having considered the Petitioner's "MOTION FOR RECONSIDERATION";

Now, therefore, it is hereby

ORDERED:

That Petitioner's motion for reconsideration is denied.

DATED at Olympia, Washington this 4th day of November, 2010.

For the Court

/s/ Madsen, C. J.
CHIEF JUSTICE

169 Wn.2d 491

NO. 82326-0

SUPREME COURT
OF THE
STATE OF WASHINGTON

NOEL PROCTOR,

Petitioner,

vs.

ROBERT "FORD" HUNTINGTON and
CHRISTINA HUNTINGTON, husband and wife,
and the marital community therein,

Respondents.

MEMORANDUM OF AMICUS CURIAE CITIZENS' ALLIANCE FOR PROPERTY RIGHTS

Eric R. Stahlfeld, WSBA #22002
145 S.W. 155th Street, Ste 101
Seattle, WA 98166

(206) 248-8016

Attorney for Amicus Curiae
Citizens' Alliance for
Property Rights

[1] A. INTRODUCTION

Citizens' Alliance for Property Rights (CAPR) submits this Amicus Curiae Memorandum pursuant to RAP 12.4(i), in support of Petitioner Noel Proctor's

Motion for Reconsideration. CAPR questions the soundness of the legal principles announced in the course of the opinion.

B. FACTS RELEVANT TO MEMORANDUM

Respondents Robert and Christina Huntington built their entire home, garage and well onto the property of Petitioner Noel Proctor. The Huntingtons chose a particularly valuable site, a flat, elevated lookout with a commanding view in a generally hilly area intermixed with marshland.

The Huntingtons did not hire their own surveyor to determine their property lines. Instead, by chance they met a surveyor (Peoples) who worked for the previous owner (Moss), who had not even requested a survey of the property lines, but one to regulate logging activities to the north of the Huntington and Proctor properties. Peoples did not provide any written documentation, but the Huntingtons claimed he told them one particular marker was the corner of their property adjacent to Proctor's property. Peoples denied any such [2] representation, and Proctor argued there was "considerable testimony" that Peoples had not even set the particular marker at the time the Huntingtons claimed they met him.

Proctor later hired his own surveyor to locate the corners of his property, which revealed the encroachment. After negotiations failed, Proctor sued to quiet title and eject the Huntingtons. The trial court

instead ordered Proctor to sell in fee an acre of his property to the Huntingtons.

C. ISSUE PRESENTED

Should the *Arnold* criteria be elements, all of which must be met, or factors to be balanced?

D. ARGUMENT

This Court has taken a legal test which previously required clear and convincing proof of all five elements, and converted it into a "balancing" test where a trial court may weigh certain elements so heavily that it need not find other elements are met. It is as if, for a basic tort claim involving duty, breach, causation, and damages, a trial court could find duty, breach and damages so weighty that a complete lack of causation is irrelevant. In so doing, the court encourages the actual transfer of private property [3] from one individual to another, against his will.

1. Prior cases almost always protected property.

In over one hundred years of reported decisions, this Court has issued only two opinions which authorized a court sitting in equity not to issue a writ to allow a private property owner to eject a trespasser

who has encroached onto his property.[1] While a lawsuit seeking a writ of ejectment is called "extraordinary," in fact it is the normal and usual method to remedy encroachment onto private property.[2] Failure to issue a writ of ejectment has truly been a rare occurrence, which indicates the protection given to private property.

The most recent of these cases is *Arnold v. Melani, supra,* which set forth the test for when a court may refuse to issue an injunction directing the removal of an encroachment. Equity has the right to deny the extraordinary remedy of a mandatory injunction when it

> appears (and we particularly stress), [4] that: (1) The encroacher did not simply take a calculated risk, act in bad faith, or negligently, willfully or indifferently locate the encroaching structure; (2) the damage to the landowner was slight and the benefit of removal equally small; (3) there was ample remaining room for a structure suitable for the area and no real limitation on the property's future use; (4) it is impractical to move the structure as built; and (5) there is an enormous

---

[1] *Peoples Sav. Bank v. Bufford,* 90 Wash. 204, 155 P 1068 (1916); *Arnold v. Melani,* 75 Wn 2d 143, 437 P 2d 908, 449 P.2d 800, 450 P.2d 815 (1968-1969)

[2] Writs are "extraordinary remedies" in contradiction to the ordinary remedy by "action" Black's Law Dictionary 587 (6th Ed. 1990). An "action" is a lawsuit brought in a "court of law" *Id.,* at 28. "Extraordinary does not mean "rare" or "uncommon"

> disparity in resulting hardships. . . . [W]e further require (as was present in this case) that the evidence of the *elements* listed above be clearly and convincingly proven by the encroacher.

75 Wn.2d at 152 (emphasis added). Denial of an injunction is "exceptional relief for the exceptional case." *Id.*

Bufford, supra, is best considered as an exception to the rule that real property is unique. The encroachers erroneously believed they built their home on their own lot; the Court refused to eject them on the condition they "deed their *identical* parcel to the [true owner]." Slip op. at 7 (emphasis added). The Court almost certainly would not have authorized a forced exchange were the two lots distinguishable (even if they were of equal value).

Otherwise, previous opinions reflect nothing more than the gradual change from differentiating courts sitting in law from those sitting in equity. [5] For example, *Hart v. City of Seattle,* 45 Wash. 300, 88 P. 205 (1907), arguably added a remedy of money damages (traditionally limited to courts of law) to an action in equity (to enjoin the government from damaging private property by lowering a street without first paying compensation, contrary to express requirements in Wash. Const. art I, § 16).

2. Proctor v. Huntington changes the law.

The Court authorizes a forced sale of one acre in exchange for $25,000. The encroachers built their entire home, garage and well outside their own property. The encroachers located their property line based solely on a verbal statement from a surveyor, not hired by them, whom they met "by chance." *Proctor v. Huntington,* 146 Wn. App. 836, 842, 192 P.3d 958 (2008).

The Court agrees that the encroachment "was not 'slight' in an absolute sense," as did the Court of Appeals. Slip op. at 13, 4. Nevertheless the Court demands evolution from an "injunction rule" toward a more reasoned, flexible approach, Slip op. 14, guided by a "duty to achieve fairness." Slip op. at 13.

The only analysis determining what is "fair and just" compared the cost to the encroachers, [6] $300,000, to the benefit to the property owner of keeping one more acre of a total of thirty. Slip op. 13-14. The only other aspect related to the *Arnold* factors is mention of "both parties' good-faith surveying mistake." Slip op. 13.

3. Proctor destroys property rights.

The Court in *Proctor* converts a traditional test requiring all five *Arnold* elements be met into one where a trial court judge will consider those five elements merely as factors to be balanced to "achieve

fairness." The judge will "reason" by considering the *Arnold* factors "as part of" its duty. Slip op. 13.

After *Proctor* it is appropriate to allow the fifth *Arnold* factor, a disparity in hardships, to outweigh the second *Arnold* factor, that the damage to the landowner be "slight." Similarly, the disparity in hardships can outweigh the first *Arnold* factor, that the encroacher not negligently or indifferently locate his structure. There evidently no longer is any requirement that all elements be proved, much less tha[t] they be proved by clear and convincing evidence.

This destroys private property rights.

Fundamental to private property is the right [7] to exclude others, and the right not to sell your property. *Loretto v. Teleprompter Manhattan, CATV Corp.,* 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982) ("the power to exclude has traditionally been considered one of the most treasured strands in the owner's bundle of property rights"); *United States v. General Motors Corp,* 323 U.S. 373, 377-78, 65 S.Ct. 357, 89 L. Ed. 311 (1945) (property bundle of sticks includes right to control disposition); *Manufactured Housing Cmtys. of Washington v. State,* 142 Wn.2d 347, 368, 13 P.2d 183 (2000) (required right of first refusal deprives owner of "fundamental attribute of ownership"); *Guimont v. Clarke,* 121 Wn.2d 586, 605 n.7, 854 P.2d 1 (1993) (depriving the owner of a fundamental attribute of property generally a facial taking).

The new *Proctor* balancing of factors test destroys the right to exclude trespassers. All a trespasser must do is construct a sufficiently valuable encroachment that it becomes too much of a hardship on him to require him to remove the structure. The encroacher need not undertake any significant effort to locate his property lines. The encroacher may, under *Bufford,* in fact take *all* of the true owner's property.

[8] The Court also destroys the right not to sell the owner's property, another fundamental attribute of ownership. The approved remedy is a forced sale in fee, not an easement limited to the continued soundness of the encroaching structures.[3] While *Bufford* also approved a forced sale, that case involved *identical* parcels. After *Proctor* an encroacher can force the sale of property to him merely by constructing a sufficiently valuable improvement on the rightful owner's property.[4]

4. Proctor raises constitutional concerns.

"Private property shall not be taken for private use" except for specific, inapplicable exceptions. Wash. Const. art. I, § 16. The constitution does not

---

[3] The Court of Appeals baldly claims, without explanation, an "easement is not workable."

[4] The Court also goes a long way towards destroying the principle that land is unique, by approving the sale for such a large parcel

limit this protection to takings by only the legislative or executive branches.

Proctor clearly acknowledges that it is changing the background principles of state law. As such, it creates a *federal* constitutional claim that the State has taken private property contrary [9] to what had been the common law. *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 120 L. Ed. 798, 112 S. Ct. 2886 (1992); *Stop the Beach Renourishment, Inc. v. Florida Dep't of Env. Protection,* ___ U.S ___, 175 L. Ed. 2d 305, 130 S.Ct. 483 (2010).

5. Proctor encourages conflict.

Throughout state history property owners have known that they must build on their own property, and respect the property of others. Should they encroach on a neighbor, they have faced the prospect of being forced to incur the costs of removing the structure, and losing their initial investment.

Now it becomes a race to completion. Should the encroacher finish construction sufficiently that it becomes more of a hardship on him to remove it than the burden of paying the property owner for the market value of the land taken, prior to the owner discovering the encroachment, then a trial court following *Proctor* can force the sale.

There is no requirement to obtain a survey. Although in *Proctor* the encroacher testified he discussed the property location with a surveyor, in

Bufford the encroacher merely asked the seller [10] where his lot was.

Consequently one is better off acting in ignorance, rather than respecting a neighbor's property. This will lead only to more conflicts between neighbors.

6. Proctor places undue burdens on judges.

A trial court applying the *Arnold* elements rules on whether each legal requirement is met. Disagreement is limited to issues of sufficiency of evidence.

Under *Proctor,* however, a trial court must put its *judgment* in issue. It is no longer a question of whether there is clear and convincing evidence that, for example, the encroacher did not act indifferently. The trial judge must now use his judgment to compare how much effort the encroacher made to locate the structure with how much a hardship it would be to make him remove it.

Every trial will result in a "winner" and a "loser." The "loser" will focus on the trial court's *judgment.* As these cases pile up, there will be more and more dissatisfaction with the judiciary's *judgment.*

E. CONCLUSION

The Court should reconsider its opinion.

[11] DATED: September 13, 2010.

/s/
ERIC R. STAHLFELD,
WSBA #22002